Office-Supreme Court, U.S.
FILED
DEC 6 1982
ALEXANDER L. STEVAS,
CLERK

82-963

No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1982

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

QUESTION PRESENTED

Whether the Fourth Amendment to the United States Constitution requires inflexible application of the exclusionary rule when a police officer has reasonably and in good faith relied upon a search warrant to seize items specified in his application for the warrant, but the warrant is subsequently invalidated for judicial error in failing to specify the items in the warrant itself?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

OPINION BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOKED.....2

FOURTH AMENDMENT.....2

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS.....3

REASONS FOR GRANTING THE WRIT.....9

I. THE REFUSAL OF THE SUPREME JUDICIAL COURT TO RECOGNIZE A REASONABLE GOOD FAITH EXCEPTION TO APPLICATION OF THE EXCLUSIONARY RULE CONFLICTS WITH THE TENOR OF DECISIONS BY THIS COURT AND DECISIONS OF LOWER FEDERAL AND STATE COURTS.....9

A. The Decision Below Conflicts With Decisions Of This Court..10

B. The Courts Of Appeal Of The Various Circuits Are In Conflict Over Adoption Of A Good Faith Exception.....20

C. The Decision Of The Court Below Conflicts With Decisions Of Other State Courts.....23

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases

Aquilar v. Texas,
378 U.S. 108 (1964).....20

Almeida - Sanchez v. United States,
413 U.S. 266 (1973).....11

Brown v. Illinois,
422 U.S. 590 (1974).....19

California v. Minjares,
443 U.S. 916 (1979).....19

Chapman v. California,
386 U.S. 18 (1966).....17

Commonwealth v. Sheppard,
387 Mass. 488 (1982).....3, 7, 9, 14, 15

Lo-Ji Sales, Inc. v. New York,
442 U.S. 319 (1979).....16

Michigan v. DeFillippo,
443 U.S. 31 (1979).....12

People v. Adams,
53 N.Y.2d 1 N.E.2d 537 (1981)..23, 24

People v. Pierce,
88 Ill. App.3d 1095
N.E.2d 295 (1980).....25

Richmond v. Commonwealth,
Ky. Ct. App. 7/31/81,
29 Cr. L. 2529 (1981).....25

State v. Lehnen,
403 So.2d 683 (La. 1981).....25

State v. Muncey,
130 Ariz. 389 P.2d 637 (1981).....25

Stone v. Powell,
428 U.S. 465 (1976).....18, 19

United States v. Alverez - Porras,
643 F.2d 54 (2nd Cir. 1981).....23

United States v. Calandra,
414 U.S. 338 (1974).....27

United States v. Janis,
428 U.S. 433 (1976).....19

United States v. Kasrathanos,
531 F.2d 26 (2nd Cir. 1976),
cert. denied, 428 U.S.
910 (1976).....23

United States v. Peltier,
422 U.S. 531 (1975).....10

United States v. Wellins,
654 F.2d 550 n.11
(9th Cir. 1981).....23

United States v. Williams,
622 F.2d 830 (5th Cir. 1980)
(en banc), (cert. denied,
449 U.S. 1127 (1981).....20, 22

Statute

28 U.S.C. §1257(3).....1

Arizona Rev. Stats. Tit. 13,
Ch. 38, §13-3925;.....25

Colorado Rev. Stats. §16-3-308.....25

No.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 19872

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS

OPINION BELOW

The opinion of the court below (App. A) is reported at 387 Mass. 488 (1982); ____ N.E.2d ____.

JURISDICTION

The decision of the court below was entered on October 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On May 14, 1979, respondent Osborne Sheppard was indicted by a Suffolk County Grand Jury in the Commonwealth of Massachusetts for murder in the first degree.

Prior to trial a hearing was held on the defendant Sheppard's motion to suppress certain physical evidence

seized pursuant to a search warrant. The motion was denied with written findings of fact and conclusions of law. (App. B).

After trial by jury, the respondent was found guilty of murder in the first degree and sentenced to life imprisonment.

On appeal, the Supreme Judicial Court reversed judgment, holding "... we conclude that solely on the basis of opinions of the Supreme Court of the United States, the exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant." Commonwealth v. Sheppard, 387 Mass. 488, 489 (1982).

STATEMENT OF THE FACTS

The facts surrounding the discovery of the body and the investigation which resulted in the police seeking a search

warrant and an analysis of the evidence seized are comprehensively set out in the opinion of the Supreme Judicial Court (App. A, pp. 3-21). Petitioner will limit its reiteration to the facts concerning the application for issuance and return of the search warrant.

The beaten and burned body of Sandra Boulware was discovered at approximately 5:00 a.m. on Saturday, May 15, 1979. Lengths of wire were attached to one leg and near the body. Attention ultimately focused on Osborne "Jimmy" Sheppard. As a result of inconsistent statements given by Osborne, and statements given by individuals whom he had stated he was with from Friday night, May 4, to the early morning hours of May 5, and evidence of blood stains, hair and wire found in and around the trunk of a car Sheppard had borrowed in the early

morning hours of Saturday, May 5, the police determined on Sunday, May 6, that they should seek an arrest warrant and search warrant for Sheppard's home at 42 Deckard Street, Roxbury.[1/]

Detective O'Malley of the Boston Police Department prepared and typed an affidavit in support of an application for a search warrant. (App. C). By this time it was Sunday afternoon and neither a clerk nor assistant clerk of the Roxbury Division of the District Court could be found. Moreover, the police were unable to locate a suitable form of search warrant. Detective O'Malley did locate a printed warrant form formerly utilized by the Dorchester District Court for searches for

---

1/ A full description of the investigation may be found in the Appendix, App. B, pp. 4-15.

controlled substances. Detective O'Malley attempted to adapt this form by crossing out the words "controlled substance" on the cover side, replacing the word "Dorchester" with the "Roxbury" and inserting a reference to "2nd & Basement" of 42 Deckard Street as the place to be searched. However, he did not delete the reference to controlled substances in the portions of the form that constituted the application for the warrant itself. At 2:45 p.m., Detective O'Malley, other officers and a representative of the District Attorney's office appeared at the home of a judge to present the affidavit and applications for arrest and search warrants. The judge took O'Malley's oath and signed the affidavit to that effect. The judge searched to no avail for an appropriate form of search

warrant. He then undertook to make the appropriate changes in the "controlled substance" form, and dated and signed the warrant. However, as it was later determined, the judge made no change in the substantive portion of the warrant form which authorized a "search for any controlled substance ..." (App. D).

Detective O'Malley left the judge's home with the affidavit and a search warrant "[he] reasonably believed, on advice from the judge, was adequate to justify a search of the designated premises for the items listed in the application for the warrant. ..." (Commonwealth v. Sheppard, 387 Mass. at 502. (App. A, p. 38). At about 5:00 p.m., Detective O'Malley (with the affidavit and search warrant) and other officers were admitted to 42 Deckard

Street. O'Malley spoke with the defendant's mother and sister and told them the police were going to look in defendant's room and the cellar for items implicated in a homicide. It does not appear that either woman requested to see the search warrant.

The items seized and introduced at trial consisted of apparently bloodstained boots taken from the defendant's bedroom. In the cellar O'Malley took pieces of bloodstained concrete, women's earrings, and an apparently bloodstained envelope, men's jockey shorts and women's leotards, later determined to be bloodstained; three types of wire and a woman's hairpiece. The trial judge found "... the search was within the limits that O'Malley understood the warrant to permit." Findings of Fact and Rulings of Law, (App. B, p. 23).

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF THE SUPREME JUDICIAL COURT TO RECOGNIZE A REASONABLE GOOD FAITH EXCEPTION TO APPLICATION OF THE EXCLUSIONARY RULE CONFLICTS WITH THE TENOR OF DECISIONS BY THIS COURT AND DECISIONS OF LOWER FEDERAL AND STATE COURTS.

The decision of the Supreme Judicial Court is based squarely on its understanding of decisions of this court.

The court addressed the question:

> "...whether the exclusionary rule adapted by the Supreme Court of the United States to protect Fourth Amendment rights, requires the suppression of incriminating evidence obtained in the course of a police search conducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statutory requirement that search warrants describe the things to be seized." Commonwealth v. Sheppard, 387 Mass. 488-489, (App. A, p. 1).

The court concluded:

> "We conclude that, solely on the basis of the opinions of the Supreme Court of the United States, the exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant. Id. at 489.
>
> "...we conclude, on the basis of opinions of the Supreme Court to date, that the exclusionary rule requires suppression of the evidence seized at 42 Deckard Street. Id. at 507-508.

A. The Decision Below Conflicts With Decisions Of This Court.

Decisions of this court at least implicitly recognize a reasonable good faith exception to application of the exclusionary rule.

In United States v. Peltier, 422 U.S. 531 (1975), this court denied retroactive effect to its decision in

Almeida - Sanchez v. United States, 413 U.S. 266 (1973) (enunciating new Fourth Amendment standards involving roving border patrol searches). In doing so, the court examined the dual purposes underlying application of the exclusionary rule: preservation of judicial integrity and deterrence. As to considerations of judicial integrity the court stated:

> "The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. Id. at 537.

In considering the deterrence rationale for application of the exclusionary rule the court stated:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge that the search was unconstitutional under the Fourth Amendment." Id. at 542.

More recently in Michigan v. DeFillippo, 443 U.S. 31 (1979), this court refused to require suppression of evidence seized incident to an arrest pursuant to an ordinance later declared unconstitutional. The court refused to require that the "prudent officer" anticipate a subsequent judicial determination that the ordinance was unconstitutional.

In both cases this court has recognized some limitation of the exclusionary rule when officers act in reasonable good faith.

Here, the conduct of the officers cries out for a more reasoned application of the exclusionary rule than the rigid, inflexible per se approach of the majority of the Supreme Judicial Court.

There is no argument that the officers had probable cause for the search. Their application was specific in terms of the items to be seized and places to be searched. Under circumstances requring immediate action they sought out a judge to request the necessary warrant. The officers were assured by the judge that he would make the necessary alterations to the only warrant form to be found on that Sunday

afternoon. Both the trial judge and the Supreme Judicial Court found that the defendant, who was at liberty, could reasonably be expected to learn from others at "the gaming house" that he was under investigation. (Commonwealth v. Sheppard, 387 Mass. 488, 497 (1982). (Findings at #14, App. B, pp. 10-19). Moreover, it should be noted that the items sought could be easily disposed of by the defendant. Yet, under these circumstances, the police sought a warrant; the police officer was informed by the judge that the warrant delivered sufficient authority to carry out the search as requested and the search was in fact limited to the items particularized in the affidavit. (Findings at #15, App. B, p. 22). The officers exercised the warrant in complete conformity with the affidavit

which accompanied Officer O'Malley. Clearly, no actual prejudice accrued to the defendant as a result of the technically defective warrant.

The plurality decision of the Supreme Judicial Court acknowledges that the police conduct in this case was proper;

> "the police ... received a search warrant they reasonably believed, on advice from the judge, was adequate to justify a search of the designated premises for the items listed in the application for the warrant" Sheppard at 502.
>
> "... the police 'conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge." Id. at 503.

Yet, finding that the issuing judge had acted, "negligently, but in good faith"

in failing to strike out the inappropriate words in the warrant form, or to refer to or physically attach the recitation of items to be seized contained in the affidavit, the Supreme Judicial Court felt constrained to apply the exclusionary rule.

Obviously, such application of the exclusionary rule cannot be construed to provide a deterrent to police misconduct. It is suggested that application of the exclusionary rule to deter judicial negligence is not compelled by any decision of this court. This is not a case in which the judge participated in the investigation or execution of the search warrant (Compare Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-328 (1979)). There is no claim that the issuing judge acted in any but an impartial manner. It is

submitted that under these circumstances, the appropriate response of a reviewing court should include or be limited to examination of the alleged error, be it of constitutional magnitude, to determine if it is harmless beyond a reasonable doubt (Compare Chapman v. California, 386 U.S. 18 (1966). Such examination could be limited to a determination of prejudice to a defendant. If, as here, no prejudice is found, the error should be deemed harmless and no further consideration given to application of the exclusionary rule. To punish society for negligent judicial error which caused no prejudice to the defendant goes far beyond any requirement of the Fourth Amendment. Per se application of the exclusionary rule under these circumstances can only

be deemed Draconian. It cannot be aruged that either the search itself or the police conduct was unreasonable in any constitutional sense.

Not only does the decision below conflict with the majority decisions of this court in Peltier and DeFillippo, it also runs directly contrary to statements of individual Justices of this court. Dissenting in Stone v. Powell, 428 U.S. 465 (1976), Justice White set forth a view of the exclusionary rule which has particular applicability to the circumstances of the instant case.

> "[T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having

reasonable grounds for this belief." Stone v. Powell at 538.

Chief Justice Burger concurring in Stone has suggested the rule should be limited in its scope to "egregious bad faith conduct" and expressed support for Justice White's suggestion that the rule be modified. Stone v. Powell at 501, (Burger, C.J. concurring). See also Brown v. Illinois, 422 U.S. 590, 612 (1974) (Powell, J. concurring in part); United States v. Janis, 428 U.S. 433, 453 (1976); California v. Minjares, 443 U.S. 916 (1979); (Rehnquist, J., with Burger, C.J. dissenting).

The instant case, it is suggested, presents a unique opportunity for the court to speak as a whole on the application of the exclusionary rule to reasonable good faith conduct by the police; conduct which is flawed only by

a technical, negligent mistake by a neutral magistrate.[2/] The obvious importance and need for resolution of the issue to the public and to law enforcement is emphasized by the conflict between the federal courts of appeal and state courts of last resort in their attempts to resolve the issue.

B. The Courts Of Appeal Of The Various Circuits Are In Conflict Over Adoption Of A Good Faith Exception.

In United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), (cert. denied, 449 U.S. 1127 (1981), the Fifth Circuit adopted a good faith exception to the exclusionary rule where an officer had acted in good faith and

---

2/ It should be noted that the magistrate's error did not involve an error of judgment in determining probable cause. See Aguilar v. Texas, 378 U.S. 108 (1964).

with a reasonable belief that his conduct was constitutionally proper. In Williams, a Drug Enforcement Administration agent arrested an individual he knew was violating a travel restriction which had been placed upon her when she was released on appeal of another conviction, a subsequent search of her person and search of her luggage pursuant to a warrant, revealed quantities of heroin. It was later determined that the defendant's violation of the travel restriction did not constitute a crime under 18 U.S.C. §3146.

In adopting a reasonable good faith exception to the exclusionary rule, the court delineated two categories in which the exception was applicable: "good faith mistake," - an action under a reasonable factual error, and a good

faith "technical violation" in which an officer has reasonably relied upon a statute later ruled unconstitutional or a warrant which is later invalidated. Williams, at 841, 846.

It is the latter exception into which the present case falls and the rationale for declining to impose the exclusionary rule is apposite.

> "[T]he exclusionary rule exists to deter willful or flagrant action by police, not reasonable, good faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high ... with few or no offsetting benefits." Id. at 840.

Here, the cost is to suppress reliable physical evidence in the trial of a murderer, in a case in which police relied upon a warrant and the error in

the warrant operated to no prejudice to the defendant.

While the Second[3/] and Ninth[4/] Circuits have given consideration to a good faith exception, neither has adopted it outright. Other circuits have rejected such an exception and given broad application to the exclusionary rule, United States v. Kasrathanos, 531 F.2d 26 (2nd Cir. 1976), cert. denied, 428 U.S. 910 (1976).

C. The Decision Of The Court Below Conflicts With Decisions Of Other State Courts.

In People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537 (1981), the New York Court of Appeals recognized an exception to the

---

3/ United States v. Alverez - Porras, 643 F.2d 54, 60 (2nd Cir. 1981).

4/ United States v. Wellins, 654 F.2d 550, 556 n.11 (9th Cir. 1981).

exclusionary rule where the police in good faith relied upon the consent of a party to a warantless search, whose authority to consent was later determined to be inadequate. The court declined to apply the exclusionary rule where police

> "rely in good faith on the apparent capability of an individual to consent to a search and the circumstances reasonably indicate that the individual does, in fact, have the authority to consent, evidence obtained as a result of such a search should not be suppressed. ... We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers." People v. Adams, 53 N.Y.2d 1, 9 (1981).

Certain other state courts have also refused to exclude evidence where although police acted pursuant to an invalid search warrant, they had

probable cause and their misconduct was neither flagrant nor conscious (People v. Pierce, 88 Ill. App.3d 1095, 411 N.E.2d 295 (1980); or where material facts were omitted, in good faith, from an affidavit in support of a search warrant (State v. Lehnen, 403 So.2d 683 (La. 1981). See also, State v. Muncey, 130 Ariz. 389, 636 P.2d 637 (1981); Richmond v. Commonwealth, Ky. Ct. App. 7/31/81, 29 Cr. L. 2529 (1981).

In addition to state court decisions concerning a reasonable good faith exception at least two states, Arizona and Colorado, have passed statutes codifying the "good faith" exception.[5/]

5/ Arizona Rev. Stats. Tit. 13, Ch. 38, §13-3925; Colorado Rev. Stats. §16-3-308.

The foregoing demonstrates considerable disarray and conflict in the application of the exclusionary rule. The effect of such uncertainty can only be delerterious to law enforcement officials charged with honoring constitutional guarantees as well as securing probative evidence to combat criminal activity. The decision of the Supreme Judicial Court in ordering suppressed the physical evidence probative of the defendant's guilt in a murder prosecution does nothing to deter police misconduct - the court found no misconduct. As to the promotion of judicial integrity, it is questionable whether the integrity of the judiciary should be promoted to detriment of society. The cost to society in suppressing physical evidence

of a defendant's guilt is simply too great, and does not, it is suggested, enhance society's belief in judicial integrity.

It is respectfully submitted that since this court "judicially created" the exclusionary rule (United States v. Calandra, 414 U.S. 338, 348 (1974)), it is incumbent upon this court to now dictate what is the "reasonable" application of the rule. It is only the "unreasonable" search which is prohibited by the Fourth Amendment, not the reasonable, use of a technically deficient search warrant.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts should be granted.

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: Barbara A. H. Smith

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

82-0163

APPENDIX A

S-2513 S.J.C.

COMMONWEALTH vs.
OSBORNE SHEPPARD.

WILKINS, J. In this appeal from a conviction of murder in the first degree, we are faced with the serious and challenging question whether the exclusionary rule, adopted by the Supreme Court of the United States to protect Fourth Amendment rights, requires the suppression of incriminating evidence obtained in the course of a police search conducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statutory requirement that search warrants describe the things to be seized. See Fourth Amendment to the Constitution of the United

States;[1] art. 14 of the Declaration of Rights of the Constitution of the Commonwealth;[2] and G. L. c. 276, § 2.[3] We conclude that, solely on

---

1/ The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2/ Article 14 provides, in part, that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of . . . all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant . . . to make search in suspected places . . . or to seize . . . property, be not accompanied with a special designation of the . . . objects of search . . . or seizure."

3/ General Laws c. 276, § 2, as appearing in St. 1964, c. 557, §2, provides in part that "[s]earch warrants . . . shall particularly describe the property or articles to be searched for." They must be substantially in the form prescribed in G. L. c. 276, § 2A.

the basis of the opinions of the Supreme Court of the United States, the exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant. We reject the defendant's other, considerably less substantial challenges to his conviction.

The badly burned body of Sandra D. Boulware, a twenty-nine year old black woman, was found in a vacant lot in the Roxbury section of Boston at approximately 5 A.M. on Saturday, May 5, 1979. Pieces of wire were found on the body and in the vicinity of the body. An autopsy, conducted about 8 A.M. that day, disclosed that the victim had died of multiple compound comminuted skull fractures, caused by at least four blows inflicted within a day of the autopsy. There was medical testimony that the

victim was alive, but unconscious, at the time her body was set on fire, but that she succumbed to the blows inflicted on her and not as a result of the burning of her body.

The victim's sister had reported her missing on May 4, and said that she had last seen her on May 1. She identified the body at the morgue. The police learned that the victim had two boyfriends, "Rudy" and "Jimmy." The defendant was known as "Jimmy." The police interviewed "Rudy" on Saturday afternoon, May 5. They also undertook to locate the defendant. Two police officers who knew the defendant went looking for him. They eventually went to a house in Dorchester known as a "gaming house," because card games were regularly played there. After they rang the doorbell, the defendant answered the

door. The police told him that "the Sergeant" wanted to talk to him at the police station. The defendant said, "Let me get my coat." He went upstairs, accompanied by one of the police officers, and obtained his coat. The defendant, who was not handcuffed, rode to the police station in the back seat of an unmarked police cruiser; the two policemen were in the front seat. The defendant had had experience with police investigations; he had been arrested previously; and he knew he was not in custody. One of the policemen gave the defendant Miranda warnings. In answer to questions in the cruiser, the defendant said he had last seen the victim on Tuesday (May 1). He had gone to her house, stayed there for about an hour, and left with her in a taxicab. They stopped to purchase some marihuana

and a bottle of amaretto. The victim left him, he said, at 1 P.M. and he had not seen her since. One of the policemen told the defendant that Sandra Boulware was no longer with us."

At the District 2 police station, Sergeant Bornstein interviewed the defendant in the presence of several other officers. The interview, which lasted about an hour, was recorded on tape.[4/] The defendant substantially repeated what he had said in the police cruiser on the way to the police station and added that on Tuesday, after purchasing the marihuana and the amaretto, he and the victim had gone to the defendant's home at 42 Deckard Street

---

4/ The tape was introduced as an exhibit and was heard by the judge during the hearing on the defendant's motion to suppress. At the trial, the tape was introduced as an exhibit and heard by the jury.

in Roxbury where the victim stayed until she left at 2 P.M. to take a cab. The defendant gave an explanation of his whereabouts from Tuesday (when he claimed he last saw the victim) until Saturday (the day of the interview). He said that he had been at the "gaming house" in Dorchester, where the police found him, from 9 P.M. on Friday (May 4) until he left at 5 A.M. on Saturday (May 5) to take a bus home to Deckard Street. The defendant identified various people who were at the "gaming house" that night. At the end of the interview, Sergeant Bornstein thanked the defendant, and the defendant left the station.[5/]

5/ The defendant's motion to suppress evidence included a challenge to the admissibility of his statements to the police in the cruiser and at the District 2 police station.

The police continued their investigation. They interviewed the men who the defendant had said were at the "gaming house" on Friday night. They learned that at about 3 A.M. on Saturday, the defendant had borrowed the car of one Barros to drive two men home. He dropped them off in a trip that took no more than fifteen minutes. The defendant returned the car to the "gaming house" at about 4:45 A.M. He lay down for only few minutes, suddenly jumped up, said he had something to do, and left.

The police also learned that at approximately 6 A.M. on Saturday, an occupant of the "gaming house," one "Pee Wee," had left for work. He noticed a pair of black calfskin gloves and a gas can in a corner of the porch, and

brought them into the house. The police took possession of these items on Sunday morning.6/

In the course of their investigation on Sunday morning, the police learned from a friend of the defendant that the basement of the defendant's home at 42 Deckard Street had been refinished and that the defendant had said that he entertained women there. On Sunday morning they also spoke with Barros, the owner of the car the defendant was said to have borrowed early on Saturday morning. Barros corroborated the fact that the defendant had borrowed his car,

---

6/ At the trial, "Pee Wee" testified that on Saturday (May 5) in the afternoon, when he arrived back at the "gaming house," the defendant was there and said, "[O]h Pee Wee, I see that you brought my gloves and gas can in . . . . I appreciate it very much." The police and the prosecution were not aware of this statement until the trial.

a 1975 black Thunderbird. Only the defendant had used the car in the interim. The police then inspected the Thunderbird with Barros's consent. They found bloodstains and pieces of hair on its rear bumper and near the lid of the trunk. Barros told the police that there had been no blood in the trunk or along the bumper on Friday night when he had driven the car home. Various samples were taken. Inside the trunk, the police found three types of wire.

Later Sunday morning, the district attorney for the Suffolk district, Sergeant Bornstein, and Detective Peter J. O'Malley met at the District 2 police station to discuss the case. They concluded that they should seek a warrant for the arrest of the defendant and a warrant to search 42 Deckard Street, Roxbury. Detective O'Malley

prepared and typed an affidavit in support of an application for a search warrant. The district attorney, his first assistant, and Sergeant Bornstein looked at it and concluded that it set forth probable cause for the arrest and for the search.7/

7/ The circumstances set forth in the affidavit are as follows: "On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Boulware was found beaten and burned to death opp. 28 Hazelwood St. Rox. in a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation that followed, it was determined that one Osborne Sheppard of 42 Deckard St. Rox. was the last person to have been seen with Sandra. In an interview [he] gave to Sgt. Bornstein, O. Sheppard stated that he and Sandra went to 42 Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickel bags of herb and a fifth of amaretto liquor. Officers in this investigation have established that O. Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found. And that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his [having] taken

It is at this point that problems

---

possession. Also in the trunk of this car were found various pieces of wire and rope that may have been used to bind parts of her body. Pieces of wire were found on the body. O. Sheppard has told McKinley Grimes, a friend, that in the past he has taken women friends to his cellar at 42 Deckard St. for social purposes and has worked on the cellar to make it comfortable." (Corrected for punctuation and spelling errors.)

The affidavit described the premises to be searched as the second floor at 42 Deckard Street, Roxbury, and "that part of the cellar controlled by Osborne [Jimmy] Sheppard." It described 42 Deckard Street as a "three story red brick apartment building with a basement."

The affidavit listed the property for which the search was intended as follows: "A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim." (Corrected for punctuation and spelling errors.)

began that led to the issuance of a defective warrant. It was then Sunday afternoon. No clerk or assistant clerk of the Roxbury Division of the District Court Department could be found, nor could a suitable form of search warrant be found at the District 2 police station or at two or three other stations. Detective O'Malley found a warrant form of the Municipal Court of the Dorchester District, once used for searches for controlled substances. He attempted to adapt the printed form. He crossed out the words "controlled substance" on the cover side of the form. On the face side, he replaced the word "Dorchester" with the word "Roxbury." He inserted a reference to "2nd & Basement" of 42 Deckard Street as the place to search. However, the reference to "controlled substance" was

not deleted in those portions of the form that constituted the application for a search warrant and would constitute the warrant itself.

Arrangements were made to present the affidavit and applications for a search warrant and an arrest warrant to a judge at his home. Detective O'Malley, Sergeant Bornstein, two homicide detectives, and the first assistant district attorney went to the judge's home, arriving at approximately 2:45 P.M. The judge took Detective O'Malley's oath and signed the affidavit to that effect. The judge searched his library without success for an appropriate form of search warrant. He then took the "controlled substance" form from Detective O'Malley, made some changes on it, and dated and signed the warrant. The judge made no change in

the substantive portion of the printed warrant form which, therefore, contained authority "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance." The warrant made no reference to the items listed in Detective O'Malley's affidavit in support of the application. It neither listed them, nor incorporated them by reference; nor was the affidavit attached to the warrant.[8/] The judge gave the search warrant, the affidavit, and the arrest

---

8/ We note in passing, although the Commonwealth makes no point of it before us, that the warrant on its face authorized a search for marihuana, that the defendant referred to marihuana, and that a search for marihuana at 42 Deckard Street was justified by probable cause.

warrant to the police. The defendant raises no challenge to the arrest warrant. Detective O'Malley left the judge's home with the affidavit and had it with him during the search. He thought the search warrant was legal and proper when he left the judge's home. The arrest warrant was executed at the "gaming house," while Detective O'Malley and a team of police personnel went to 42 Deckard Street to search its second floor and basement.

At about 5 P.M. Detective O'Malley and others were admitted to 42 Deckard Street. Detective O'Malley spoke with the defendant's mother and sister, showed them the warrant, and said the police were going to look in the defendant's room and in the cellar for things that were implicated in a homicide. It does not appear that

either of the two women read the warrant or asked to have it read.

We summarize the evidence seized at 42 Deckard Street which was introduced at the trial. From the defendant's second floor bedroom, the police took apparently bloodstained black boots. In the cellar, part of which was furnished as a playroom, Detective O'Malley found what appeared to be blood stains on the concrete floor and chipped off and took pieces of that concrete. He found two unmatched women's earrings, one apparently with bloodstains, under a piece of plywood which in turn was under a mat in the unfinished portion of the cellar. In the unfinished portion of the cellar, he found an apparently bloodstained envelope, a pair of apparently bloody men's jockey shorts and women's leotards, later determined

to be bloodstained. He also found there three types of wire and a women's hairpiece.

We interrupt the chronology of events to describe evidence introduced at the trial bearing on the significance of these items seized at 42 Deckard Street. A police chemist testified that wire found at the murder scene was similar to wire found in the Thunderbird and in the basement of 42 Deckard Street. He also found a close resemblance between wire of a different type found in the cellar and also in the Thunderbird. A neighborhood friend of the victim identified the bloody earring recovered from the basement as looking like one the victim was wearing about one week before her disappearance. She also identified the leotards as of a type she and the victim had purchased

together and the hairpiece as one the victim was wearing the last time she saw the victim alive on Monday, the day before she disappeared. Another witness identified the earring as belonging to the victim.

A special agent of the FBI, assigned to the serology unit of the FBI laboratory in Washington, D.C., testified that blood from the bumper of the Thunderbird was human blood, type O, and contained enzyme groups PGM 2-2 and EAP B-A; that the right black boot found in the defendant's bedfroom had human blood on it, type O, with enzymes PGM 2-2 and EAP B-A; that blood found underneath the victim's head at the murder scene was human blood containing enzymes PGM 2-2 and EAP B-A (but he could not determine the blood grouping); that blood taken from the victim's body

by the medical examiner contained enzymes PGM 2-2 and EAP B-A. There was other evidence introduced showing that the victim had blood type O. The concrete chips and the envelope taken from the cellar were found to be stained with type O blood. The FBI expert witness testified further that about 1% of the population would have blood type O and the enzymes PGM 2-2 and EAP B-A.

It can readily be seen that evidence seized in the search of 42 Deckard Street tended to show that the defendant seriously injured the victim in his cellar, hid her earrings under a piece of plywood under a mat, and tied her up with wire available in the cellar of his home. This evidence, much of it obtained as a result of careful and commendable police investigatory techniques, was highly probative of the

defendant's guilt. Although the Commonwealth could have presented a case against the defendant without this evidence, this evidence was most important in rounding out a case based only on circumstantial evidence.

An indictment was returned against the defendant on May 14, 1979, charging him with murder, including murder in the first degree, of Sandra D. Boulware. The defendant moved to suppress the statements he made to the police on May 5 and the items seized on May 6 at 42 Deckard Street. He claimed, among other things, that his interrogation on May 5 was a custodial interrogation in violation of his Fourth Amendment rights. In turn, he argued that the search warrant was based on his statements to the police and that the items seized pursuant to the search

warrant had to be suppressed as the product of his unconstitutional interrogation. Further, he argued that the items seized at 42 Deckard Street should be suppressed because they were seized pursuant to a defective, unconstitutional search warrant.

A judge of the Superior Court held a three day hearing on the motion to suppress in September, 1980. He made extensive findings of fact and rulings of law. He dealt with certain issues that are not argued on appeal. He concluded that the defendant freely and voluntarily made statements on May 5 at the District 2 police station after a knowing waiver of his Miranda rights. He concluded that the investigation had not then focused on the defendant. He did not explicitly discuss the defendant's argument that his statements

should be suppressed because of his "illegal arrest" or "seizure," but it is apparent from his findings that he regarded the defendant's trip to the police station and his statements made there as voluntary. He, therefore, denied the motion to suppress as it applied to the defendant's statements to the police on May 5.

On the matter of the search warrant, he concluded that the warrant was issued on probable cause. He concluded, however, that the warrant was defective because it failed to list the items to be seized or to incorporate a list of those items by reference. He then considered whether the exclusionary rule as applied to Fourth Amendment violations required suppression of the evidence seized pursuant to the defective warrant. He had found that

the police had a legitimate need to proceed with dispatch in obtaining the search warrant. The defendant was at liberty and could reasonably be expected to learn from those questioned at the "gaming house" that the police were investigating him. He found further that the judge told Detective O'Malley that he would make the necessary changes in the warrant form so as to provide a suitable form of search warrant and that the warrant as delivered was sufficient authority in form and content to carry out the search as requested. He found also that the search of 42 Deckard Street was carried out within the limits that Detective O'Malley understood the warrant to permit and that Detective O'Malley had the affidavit and search warrant with him at 42 Deckard Street. He concluded that "the actual search

undertaken was within the limits of the authority the police thought reasonably had been granted." He denied the defendant's request to suppress the evidence seized at 42 Deckard Street.

The judge concluded that the good faith exception to the exclusionary rule advanced by certain judges in United States v. Williams, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981), was well reasoned and persuasive. He gave greater weight to the opinion of this court in Commonwealth v. Rugaber, 369 Mass. 765, 769 (1976), in which we upheld admission of evidence seized pursuant to an assumedly defective search warrant. He regarded the Rugaber case as "a situation where law enforcement officials acted mistakenly but upon

probable cause and in good faith and which presented a factual situation in which exclusion would have no deterrent effect."[9/] He concluded that the police who executed the warrant at

---

9/ In the Rugaber case, a search was conducted on probable cause pursuant to a search warrant that properly described the street address of the premises to be searched but contained a physical description of a house next door. Commonwealth v. Rugaber, 369 Mass. 765, 767 (1976). The warrant was executed at night; officers on the scene directed the executing officers to the proper house; the proper premises were in fact searched; and the officers were unaware of the misdescription when they executed the warrant. Id. We regarded the case as a close one. Id. at 768. We noted that "[i]nvocations of error and inadvertence cannot ordinarily save an invalid warrant." Id. at 767. The police were not reckless but at most negligent in the description. Id. In these circumstances, we agree[d] with the judge, who ruled that even if the warrant was defective, the exclusionary rule should not be applied, since it could have no detterent effect." Id. at 769. The case before us is not, of course, like the Rugaber case, one in which the search warrant was ambiguous.

Sheppard's dwelling would act similarly in similar situations in the future, and that "the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function." The judge did not cite any case in which the exclusionary rule had been considered in a situation in which error was committed, not by the police or law enforcement officials, but by a judge or issuing magistrate. Neither the Williams case nor the Rugaber case, relied on by the judge, were opinions of the Supreme Court, which, of course, has the final word on this question.

1. The judge properly denied that portion of the defendant's motion to suppress evidence that was directed toward his statements made to the police on Saturday, May 5. The judge found, on

ample evidence, that the defendant voluntarily accompanied the police to the station. At the time of the interview, the police investigation had not yet focused on the defendant, and the officers only requested, but did not order, that he accompany them to the station for questioning. He was not handcuffed; he rode alone in the back of the unmarked police cruiser; he knew he was not in custody. When the interview ended, the sergeant thanked him for his cooperation, and he left.

The issue is substantially disposed of by what we said recently in Commonwealth v. Bookman, 386 Mass. 657, 659-661 (1972). This is not a case like Dunaway v. New York, 442 U.S. 200 (1979), on which the defendant relies, where there was a custodial interrogation, not supported by probable

cause, of a defendant who was involuntarily detained. The circumstances here are like those in United States v. Mendenhall, 446 U.S. 544, 557-558 (1980), in which the Court held that the defendant's Fourth Amendment rights were not violated when she voluntarily accompanied law enforcement agents to their office for questioning. As in the Mendenhall case, the prosecution here met its burden of proving that the interview was not the product of express or implied coercion, but resulted from the defendant's voluntarily consent. See, as to the absence of Fourth Amendment violations where persons consent to accompany police officers to station houses for interrogation, United States v. Huberts, 637 F.2d 630, 635-637 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981);

United States v. Williams, 604 F.2d 1102, 1125-1126 (8th Cir. 1979). See also Commonwealth v. Walden, Mass. Adv. Sh. (1980) 1309, 1315 (interrogation of a defendant who went voluntarily to the police station).

2. We come then to the question of the admissibility of the evidence seized at 42 Deckard Street purportedly pursuant to the search warrant. We start with our expression of agreement with the judge's conclusion that the warrant was defective. It failed to describe the items sought to be seized.[10/] There is authority

---

10/ The Fourth Amendment requires that a search warrant describe the "things to be seized." See Marron v. United, 275 U.S. 192, 196 (1927). Article 14 of the Massachusetts Declaration of Rights requires that the warrant be "accompanied with a special designation of the . . . objections" of seizure. The purpose of these limitations is to forbid general warrants (see Boyd v.

upholding a warrant, which does not on its face list any items to be seized, but which incorporates by reference an accompanying or attached description of the items to be seized.[11/] The warrant in this case, however, described items (drugs and drug paraphernalia) different from those listed in the affidavit (which related to the murder of Sandra Boulware, but did include marihuana). Moreover, the warrant was

---

United States, 116 U.S. 616, 624-626 [1886]), and in doing so to circumscribe the discretion of the executing officer and to inform the person or persons subject to the seizure what the officer is entitled to take. See Commonwealth v. Accaputo, Mass. Adv. Sh. (1980) 1009, 1019; In the Matter of the Application of Lafayette Academy, Inc., 610 F.2d 1, 4 (1st Cir. 1979). See also G. L. c. 276, § 2, which requires that the warrant "particularly describe the property or articles to be searched for."

11/ Commonwealth v. Taylor, Mass. Adv. Sh. (1981) 821, 825-826, and cases cited.

not attached to Detective O'Malley's affidavit which listed the items which the judge had found there was probable cause to seize. Most importantly, the warrant did not contain any words which referred to the affidavit. It is true that Detective O'Malley had with him, when he conducted the search, the application for a warrant which listed the items to be seized. We noted in Commonwealth v. Taylor, Mass. Adv. Sh. (1981) 821, 826-827 n.5, that we were not called on there to decide "whether we would allow a separate document to supply the specificity if, though physically attached to the warrant, it was not referred to therein."[12/]

12/ In the Taylor case, supra at 826-827 n.5, we noted Castle News Co. v. Cahill, 461 F. Supp. 174, 181 (E.D. Wis. 1978), which sustained a warrant that

Here, however, not only is there a lack of reference, but also the warrant listed a different set of items to be seized, and no further description was attached to the warrant. We are not aware of any court that has gone so far as to uphold a general warrant to search particular premises where the searching officer had with him a description of the items to be seized but the warrant made no reference to that description and that description was not attached to the warrant. We thus proceed on the premise that the search warrant in this case violated the requirements of the

---

did not refer to an attached document which provided the requisite specificity. To the same general effect, see Moore v. United States, 461 F.2d 1236, 1238-1240 (D.C. Cir. 1972). Contra Brooks v. Taylor Tobacco Enters. Inc., 260 S.E.2d 419, 422-423 (N.C. 1979).

Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G. L. c. 276, § 2. The question remains whether the defect in the warrant requires the suppression of evidence obtained in the search.

The exclusionary rule is "a judicially created means of effectuating the rights secured by the Fourth Amendment." Stone v. Powell, 428 U.S. 465, 482 (1976). It is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). See United States v. Peltier, 422 U.S. 531, 538-539 (1975). Moreover, because under some circumstances, evidence obtained as the result of an unreasonable search or

seizure in violation of Fourth Amendment rights is admissible, the exclusionary rule is not coextensive with the prohibitions of the Fourth Amendment.13/

Furthermore, because evidence obtained in violation of the Fourth Amendment is admissible in particular circumstances, the notion that such evidence must in all instances be

---

13/ Instances in which evidence obtained in violation of the Fourth Amendment is admissible in judicial proceedings include: (a) a case in which no objection is raised to the introduction of such evidence, (b) the use of such evidence in grand jury proceedings (United States v. Calandra, 414 U.S. 338, 350-352 [1974]), (c) introductions of such evidence for the impeachment of a defendant (Walder v. United States, 347 U.S. 62 [1954]), (d) circumstances in which the defendant has no standing to challenge the constitutional violation (Rakas v. Illinois, 439 U.S. 128 [1978]), and (e) the use of evidence seized by one sovereign in civil proceedings brought by another sovereign (United States v. Janis, 428 U.S. 433, 453-454 [1976]).

excluded in order to preserve judicial intergrity fails as a substantial, independent support for the rule. Stone v. Powell, supra at 485. Id. at 499 (Burger, C.J., concurring). See United States v. Janis, 428 U.S. 433, 458-459 n.35 (1976).[14/]

14/ We acknowledge the views of Mr. Justice Brennan that the exclusionary rule enables "the judicary to avoid the taint of partnership in official lawlessness" and assures the people "that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." United States v. Calandra, supra at 357 (Brennan, J., dissenting). See also United States v. Peltier, 422 U.S. 531, 551-562 (1975) (Brennan, J., dissenting). There are those critics of the rule who would suggest, however, that exclusion of probative and reliable evidence itself seriously undermines popular trust in government. See references in Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 737-738 (1970), and in Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. & Criminology 343, 359-360 (1980). See also Stone v. Powell, 428 U.S. 465, 491 (1976).

The substsantial, and perhaps only, justification for the exclusionary rule relied on by a majority of the Justices of the Supreme Court is the goal of deterring unconstitutional conduct by the police and other law enforcement personnel. See Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Peltier, 422 U.S. 531, 542 (1975); United States v. Calandra, 414 U.S. 338, 347 (1974). As we have demonstrated in this opinion, the police conduct in this case was proper. They had probable cause to search the premises, and they prepared an adequate affidavit setting forth that probable cause and submitted

it to a judge.[15/] The police then received a search warrant that they reasonably believed, on advise from the judge, was adequate to justify a search of the designated premises for the items listed in the application for the warrant.

The police next conducted a search of Sheppard's dwelling in a manner consistent with their good faith belief that a proper warrant had been issued. They did not exceed the scope of the search that would have been authorized by a warrant in the form that they

---

15/ This is not, therefore, a case in which the police failed to demonstrate probable cause in the application for the warrant. In such a situation, a magistrate's erroneous conclusion that probable cause was shown could not breathe validity into a warrant. Application of the exclusionary rule would be justified to deter future, inadequate presentations by officer-affiants. See Franks v. Delaware, 438 U.S. 154, 164-165 (1978); Aguilar v. Texas, 378 U.S. 108, 114-115 (1964).

sought and believed they had. The items that were the subject of the intended search were disclosed on the application for the warrant, which was present at the scene of the search. In short, the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge. The defect in the warrant was not harmful to the defendant in the circumstances of the actual search. The search was conducted in the same way and with the same results as it would have been conducted if the warrant had not been defective.16/

16/ We note that there is no issue in this case as to the reliability of the evidence sought to be excluded. Unlike evidence, such as a confession, obtained in violation of constitutional rights, the physical evidence seized from 42 Deckard Street has not been rendered untrustworthy by the fact that it was seized pursuant to a constitutionally defective warrant. See Stone v. Powell, 428 U.S. 465, 490 (1976).

The question is whether an error of a magistrate, unrelated to police error, calls for the application of the exclusionary rule. It could be argued that the exclusionary rule should apply with particular force to evidence seized pursuant to a search warrant failing to meet Fourth Amendment standards, issued by a judge who should have known, and should have been most sensitive to, the defendant's constitutional rights. If a "criminal is to go free because the constable has blundered" (People v. Defore, 242 N.Y. 13, 21 [1926] [Cardozo, J.]), perhaps the criminal should go free as well because the magistrate blundered, even though "the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal

case." United States v. Payner, 447 U.S. 727, 734 (1980). The issue is whether the exclusionary rule should be applied to deny to a jury evidence highly probative of the defendant's guilt of murder because a judge, negligently but in good faith, failed to strike out certain words in the warrant and failed to refer to, or to attach to it, a list of the items to be seized. We are not dealing here with judicial error rising above the level of negligence.17/

We have found little discussion of

17/ We acknowledge that in this case the problem arose on a Sunday in circumstances in which no proper form of warrant was readily available to the judge and there was a need for prompt action. We do not, however, intend to minimize the judge's error. The failure properly to describe in the warrant the items to be seized was a serious omission of constitutional significance.

the goal of deterrence underlying the exclusionary rule as applied to an error of a judge, except as related to his misconception of the propriety of police conduct.[18/] On occasion, the

---

18/ In Richmond v. Kentucky, 29 Crim. L. Rep. (BNA) 2529 (Ky. Ct. App. July 31, 1981), the court did not suppress evidence seized in good faith pursuant to a warrant issued on probable cause by a judge who, it was assumed, lacked authority to issue the warrant in the district in which it was issued. There was no showing that the judge acted in bad faith. See United States v. Acosta, 501 F.2d 1330, 1337 (1974) (Gee, J., dissenting) ("Nor would I expand the [exclusionary] rule to 'deter' magistrates from failing to record matter upon which they rely, conceiving that they will obey the mandates of reviewing magistrates, such as we, when these are understood"), modified, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); State v. Lien, 265 N.W.2d 833, 840-841 n.1 (Minn. 1978), quoting State v. Nolting, 312 Minn. 449, 456-457 n.7 (1977) (exclusionary rule is directed at police, not magistrate, misconduct).

For a contrasting view, see United States v. Karathanos, 531 F.2d 26, 33-34 (2d Cir.) ("[T]he exclusionary rule[ ] [has the] effect of making . . . [magistrates] aware that their decision

exclusionary rule has been characterized as directed not only toward deterring police misconduct but also "official misconduct" or "the Government's unlawful conduct." See United States v. Calandra, 414 U.S. 338, 348 (1974).19/

---

to issue a search warrant is a matter of importance . . . in regard to the success of any subsequent criminal prosecution. [It] may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires . . . . [Also,] the present universal application of the exclusionary rule . . . gives law enforcement officers no . . . incentive to seek out the most lenient magistrates"), cert. denied, 428 U.S. 910 (1976). See also Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976), in which the Ninth Circuit Court of Appeals applied the exclusionary rule to evidence seized in good faith pursuant to an unconstitutional substantive statute in order to "deter[ ] legislators from enacting such statutes."

19/ This court has not dealt with the application of the exclusionary rule to deter conduct of judges or magistrates.

There may be reasonable distinctions between police misconduct and an error of a magistrate such as is involved in this case. Police officers have the objectives of apprehending criminal wrongdoers and of obtaining evidence to convict them. As the Supreme Court has

---

We have said that "[o]ne branch of the government should not be permitted to use the flagrant wrongdoing of another branch of government to punish a citizen." Commonwealth v. Nine Hundred & Ninety-Two Dollars, Mass. Adv. Sh. (1981) 1420, 1427. In that case, however, we were dealing with alleged police misconduct. We concluded there that under art. 14 of the Declaration of Rights, a negligent misrepresentation in an affidavit in support of a search warrant of a fact material or necessary to a finding of probable cause would not alone require the suppression of evidence seized pursuant to such a warrant. Id. We noted that where "a police affiant's misstatement is the product of good faith but negligent conduct, the motivation to temper and regulate police behavior is less and the arguments against the government's using the product of that good faith but negligent conduct against a defendant are weakened." Id. at 1427-1428.

said, they are engaged in the "often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). The exclusionary rule is applied to evidence seized in an unlawful manner by law enforcement officials because it is assumed that such exclusion will "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . '[by] compel[ling] respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it.'" United States v. Calandra, supra at 347, quoting from Elkins v. United States, 364 U.S. 206, 217 (1960). See Stone v. Powell, 428 U.S. 465, 492 (1976); Michigan v. Tucker, 417 U.S. 433, 447 (1974).

Unlike police officers, magistrates who issue search warrants are required by law to be neutral and detached. According to the Supreme Court, only if the issuing magistrate is detached from the often competitive business of ferreting out crime can a search warrant satisfy the Fourth Amendment. Johnson v. United States, supra. Here, Sheppard does not claim that the issuing judge joined the police officers in an attempt to investigate Sandra Boulware's homicide, or that the judge was anything but impartial to, and disentangled from, the investigation. Contrast Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326-328 (1979) (town justice acting as a member of a search party under a general warrant).

An issuing magistrate, in contrast to a law enforcement official, should

not be involved in searching for evidence, apprehending suspects, and convicting criminals. His job is not a partisan one of ferreting out evidence and seeing it used to prosecute criminals. Instead, he should care foremost about whether he correctly applies the laws of the State and nation, including the Fourth Amendment and art, 14 of the Declaration of Rights. Ideally, he should be indifferent as to whether a particular piece of evidence is admitted at trial or a particular defendant is convicted. The police, in contrast, properly should be partisan, investigatory, and oriented toward discovering and convicting perpetrators of crime.

The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial

misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the

defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

We recognize that our task is to seek to apply the interpretations of the Constitution of the United States expressed by the Supreme Court of the United States. The usual result in a case where a warrant fails to describe the items to be seized is the suppression of the evidence seized pursuant to that warrant. See Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971). Although there are statements of individual Justices of the Supreme Court critical of the application of the exclusionary rule in particular

circumstances,[20] we conclude, on the

20/ See Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); id. at 538-540 (White, J., dissenting); Bivins v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411-427 (1971) (Burger, C.J., dissenting); Rakas v. Illinois, 439 U.S. 128, 156 n.5 (1978) (Powell, J., concurring); Brown v. Illinois, 422 U.S. 590, 611-612 (1975) (Powell, J., concurring); Michigan v. Tucker, 417 U.S. 433, 447 (1974).

These expressions of opinion suggest that, in certain instances at least, a good faith exception to the exclusionary rule might be adopted. Such an exception was recognized as appropriate by a majority of the judges of the Fifth Circuit Court of Appeals in United States v. Williams, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981). In a recent opinion, the Court noted, however, that "the State contends that the police conduct here argues for adopting a 'good faith' exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here." Taylor v. Alabama, 102 S.Ct. 2664, 2669 (1982). That case involved the suppression of a confession made shortly after an illegal arrest unsupported by probable cause.

For a detailed discussion of the appropriateness of a good faith exception, see Ball, Good Faith and the

basis of opinions of the Supreme Court

Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978).

It has also been suggested that the exclusionary rule not apply to serious crimes. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1046-1049 (1974). Professor Kaplan notes certain problems, however, with the adoption of an exception to the exclusionary rule even where the police error is inadvertent and reasonable. Id. at 1044-1045. See 1 W. LaFave, Search and Seizure § 1.2 (d), (e), and (f), at 34-39 (1978).

The Model Code of Pre-Arraignment Procedure § SS 290.2 (2) (Proposed Offiial Draft 1975), suggests that, apart from constitutional mandates, a motion to suppress evidence should be granted only where the asserted violation is substantial. In determining the substantiality of the violation, the Model Code directs courts to consider all the circumstances, including the extent of the deviation from lawful conduct, the extent to which the violation was wilful, the extent to which privacy was invaded, the extent to which exclusion will tend to prevent violations of the law, and the extent to which the violation prejudiced the defendant's ability to defend himself. Id. at § SS 290.2 (4).

to date, that the exclusionary rule requires the suppression of the evidence seized at 42 Deckard Street.[21] Because the exclusionary rule as applied by the Supreme Court in implementing the purposes of the Fourth Amendment requires the suppression of this evidence, we need not consider whether the evidence should be suppressed pursuant to the laws of this Commonwealth. To this date this court has not adopted an exclusionary rule under the law of the Commonwealth to

---

21/ There is no basis for concluding that this evidence was only cumulative. It was of probative force tending, independently of other evidence, to prove the defendant's guilt. Therefore, its admission cannot be upheld on the ground that such admission was harmless beyond a reasonable doubt.

remedy a violation of a criminal defendant's art. 14 rights.[22]

22/ Before Mapp v. Ohio, 367 U.S. 643 (1961), applied the exclusionary rule to the States through the Fourteenth Amendment, illegally seized material could be admitted in evidence in the courts of this Commonwealth. See Commonwealth v. Spofford, 343 Mass. 703, 706 (1962); Commonwealth v. Wilkins, 243 Mass. 356, 359 (1923) (art. 14 of the Declaration of Rights does not bar admission of unlawfully seized evidence).

We have noted the possibility of affording more substantive protection to criminal defendants under art. 14 of the Declaration of Rights than under the Fourth Amendment as applied through the Fourteenth Amendment. See Commonwealth v. Podgurski, 386 Mass. 385, 391 n.11 (1982); District Attorney for the Plymouth Dist. v. New England Tel. & Tel. Co., 379 Mass. 586, 589 (1980); id. at 597 n.1 (Liacos, J., dissenting); Commonwealth v. Ortiz, 376 Mass. 349, 358 (1978). We have concluded that, where the police intentionally deprived a defendant of his statutory right to use a telephone (G. L. c. 276, § 33A), "evidence of an in-custody inculpatory statement or corporeal identification, even if accidental, should not be admitted unless the Commonwealth can show beyond a reasonable doubt that the evidence is untainted by the deprivation of the defendant's right." Commonwealth v. Jones, 362 Mass. 497, 503 (1972).

3. Because they may arise at a retrial of the defendant, we comment on two other issues raised by the defendant. There is no basis for reversal of the conviction on the ground that the judge abused his discretion in denying the defendant's motion that, if he were to testify, the Commonwealth should be barred from using certain prior convictions, pursuant to G. L. c. 233, § 21, for the purpose of impeachment. See Commonwealth v. Diaz, Mass. Adv. Sh. (1981) 605, 610-612. Nor was there error in denying the

---

See Commonwealth v. Monosson, 351 Mass. 327, 329-330 (1966). In Selectmen of Framingham v. Municipal Court of the City of Boston, 373 Mass. 783, 786-788 (1977), we ruled that, "as matter of Massachusetts law, even though it may not be required by the Federal Constitution," evidence seized from a police officer's home in violation of the Fourth Amendment and art. 14 was not admissible in an administrative hearing to remove the officer.

defendant's request that he be allowed to make a sworn or an unsworn statement to the jury at the close of the evidence. The matter was within the judge's discretion. Commonwealth v. Rodriquez, 364 Mass. 87, 95-96 (1973). The defendant has made no showing of an abuse of discretion.

Judgment reversed.

Verdict set aside.

Mr. Justice Nolan took no part in the consideration or decision of this case.

LIACOS, J. (concurring, with whom Abrams, J., joins). While I agree with the result reached by the court, I cannot join in that portion of the opinion of the plurality of the court (Part 2) which treats the issue of the admissibility of evidence seized under a warrant admittedly defective.

My disagreement is specifically directed to the grudging acceptance of the exclusionary rule displayed by Justice Wilkins in his discussion of the law and the facts. Cf. Commonwealth v. Loughlin, 385 Mass. 60, 63 n.3 (1982)("Doubt about the wisdom of the views of the Supreme Court . . . on the subject of illegal searches and seizures . . . hardly justifies ignoring those views when Fourth Amendment issues are raised in this court"). Moreover, the discussion by the plurality opinion does

not accurately reflect either the facts of this case or the relevant legal principles. The plurality initially describes the question involved as one that is both "serious and challenging," because it deals with a "police search conducted in good faith." Supra at . Further, the plurality describes the issue as "whether an error of a magistrate, unrelated to police error, calls for the application of the exclusionary rule." Supra at . The plurality then characterizes the error of the magistrate as one that occurred "negligently but in good faith" and as one not "rising above the level of negligence." Supra at .

It is clear and established law that a warrant, albeit based on probable cause, must specifically describe the premises to be searched and the objects

to be seized in order to be a valid basis of a search. Ybarra v. Illinois, 444 U.S. 85, 92 n.4 (1979). Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979). Stanford v. Texas, 379 U.S. 476 (1965). Marcus v. Search Warrant of Property at 104 E. Tenth St., Kansas City, Mo., 367 U.S. 717 (1961). Marron v. United States, 275 U.S. 192, 196 (1927). Commonwealth v. Smith, 370 Mass. 335, cert. denied, 429 U.S. 944 (1976). Commonwealth v. Hall, 366 Mass. 790 (1975). The warrant herein had no reference whatsoever to the items sought to be seized, contrary to the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G. L. c. 276, § 2. Yet the plurality seeks to minimize this violation because of the alleged "good faith" of a magistrate

in issuing this grossly defective warrant.

The motion judge ruled, and a majority of the court agrees, the search warrant was constitutionally defective and in violation of Federal and State law because it did not describe with particularity the items sought in the search.[1/] Supra at . See generally supra at n.10. The court then concludes that the exclusionary rule requires the suppression of the evidence seized pursuant to the search warrant. Because, however, the plurality finds it necessary to engage

---

1/ "Such particularity is necessary in order to identify . . . the things to be seized; it both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance." Commonwealth v. Pope, 354 Mass. 623, 629 (1968).

in a gratuitous discussion of the wisdom of the rule in this instance, I am compelled to state my views on this issue.

I point out first that nowwhere in the judge's written findings is there a finding that the actions of the magistrate were merely negligent. Indeed, while the judge viewed the police as having acted in good faith,[2/] at the hearing on the motion he characterized the actions of the magistrate in these terms: "I saw this search warrant, and when I saw it I had to put my glasses on because I had not seen anything like that before. ... [T]his warrant is so inappropriate [as] to be plainly unconstitutional," under the State and Federal

---

2/ I shall comment further on this point.

Constitutions.[3] The judge viewed the warrant as a "general warrant" akin to the colonial "writs of assistance" which led to the enactment of art. 14 of the Massachusetts Constitution and the Fourth Amendment. He regarded the warrant as one that "flies right in the face of the Constitution." He characterized the magistrate's issuance of this warrant as a "judicial blunder." In describing the warrant, he stated he had "never seen anything so plainly on its face a nullity."

A reading of the search warrant in this case reveals that the judge's views were not unduly harsh.[4] Although the

---

3/ The judge also viewed the warrant as defective under G.L. c. 276, §§2, 2A.

4/ The warrant used in this murder investigation is reproduced as an appendix to this opinion.

plurality agrees that the warrant nowhere described the things the police sought to seize and was thus unconstitutional, the plurality's view of the magistrate's error as being merely one of negligent good faith is supported neither by the record nor the findings of the motion judge. A proper legal definition of "good faith" involves not only a lack of malevolence,[5/] but also a reasonable effort to comply with the law. One commentator has defined the good faith "exception" as follows: "[W]hen an officer acts in the good faith belief that his conduct is constitutional and where he has a reasonable basis for that belief, the exclusionary rule will not

---

5/ I do not view the conduct of the magistrate, the police, or the office of the district attorney as malevolent.

operate" (emphasis added). Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635, 635 (1978). See United States v. Williams, 622 F.2d 830, 841 & n.4a (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981)(recognizing that reasonable good faith exception must be grounded on an objective reasonableness). Cf. Commonwealth v. Sherry, 386 Mass. 682, 697 (1982) (mistake of fact defense requires an objective standard of reasonableness); Commonwealth v. Huffman, 385 Mass. 122, 126 (1982) (whether "exigent circumstances" present based on objective view of totality of circumstances). The magistrate who utterly fails to describe or even attempt to describe the things to be

seized with the law. Compare Commonwealth v. Rugaber, 369 Mass. 765 (1976).6/

I turn now to the conduct of the police, which both the motion judge and the plurality find to have been in good faith." At the outset, it should be emphasized that an effort to characterize police conduct here as in "good faith" is again neither factually nor legally accurate. The evidence is undisputed that the officer seeking the

---

6/ The plurality points out what, assumably, it believes to be the extenuating circumstances surrounding the issuance of this warrant. In my estimation, however, because everyone involved knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly. Thus, I would hold the officers and the magistrate to a higher standard of good faith based on the circumstances in this case which put them on notice that a defective warrant could easily be issued if proper care were not taken.

warrant was an experienced officer who had been on the force for nineteen years, ten of which were as a detective. Other experienced officers were also present. Additionally, the district attorney reviewed the application typed by this officer, and the first assistant district attorney was present at the home of the magistrate when the warrant was issued. It is also undisputed that the form of the warrant used was that used under a narcotics statute repealed about eight years earlier. See G. L. c. 94, § 213, repealed by St. 1971, c 1071, §2 (now G.L. c. 94C, the Controlled Substances Act). All present at the magistrate's home knew that the form warrant given to the judge was defective in form and substance. According to those present, the judge made only two altercations in

this warrant,[7] by changing the caption as to the issuing court and the name of the issuing magistrate.

Even if one puts aside the police officer's experience, there is no justification in treating the "police" separately from the first assistant district attorney, a trained and experienced prosecutor. See Commonwealth v. St. Germain, Mass. Adv. Sh. (1980) 1807, 1812 n.8 (police are also part of prosecution). To take the position that these law enforcement personnel acted in "good faith" is simply to say that no showing of evil intent has been proved. It cannot be said, however, that they acted

---

7/ The testimony of the officer who sought the warrant was that the visit with the judge took approximately twenty-five minutes with only three or four minutes to change the form.

reasonably when the officers, knowing from the start that the form warrant was improper, apparently never even read the warrant. Their acquiescence in the acts of the magistrate cannot be viewed as "good faith." The plurality's condonation of this default of responsibility by law enforcement personnel is particularly troubling.[8/] In using the approach it has taken, the plurality turns its back on the teaching of history and opens the door to the return of general warrants and writs of assistance.

8/ The plurality also stresses that the search, as actually carried out, was within the limits that the police understood the warrant to permit, supra at , and, in any event, the occupants of the defendant's household did not actually read the warrant, supra at . Both of these factors appear to be irrelevant in light of our recent decision in Commonwealth v. Taylor, Mass. Adv. Sh. (1981) 821, 827.

1. Judicial error. Assuming, as does the plurality opinion, that what is involved in this case is not police error but rather judicial error, the plurality points to no cases wherein the supposed good faith but negligent act of a judge who issues a defective warrant is relevant in determining whether the evidence should be suppressed. As the appellate court of last resort in this State, our primary concern is to correct judicial error in all stages of a proceeding. I fail to understand why the "good faith" of a judge should make any difference in this case. Do we not always assume that the judges of all the various courts throughout the Commonwealth carry out their duties in good faith? If our standard of review is to be limited to examining the good faith of the judge, few cases would

require reversal, and errors of law would stand uncorrected.

The plurality opinion appears to recognize that suppression of illegally seized evidence may encourage greater care by magistrates in the future, but expresses doubt as to the efficacy of such a rule in deterring judicial error. I strongly disagree with the plurality's reasoning on this point. Our responsibility as the court of last resort in this Commonwealth requires that judicial violations of the Fourth Amendment find no sanction, express or implied, in our opinions. Unless this court "safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." United States v. United States Dist. Court, 407

U.S. 297, 312 (1972). The language in today's opinion will hardly encourage greater care by judges who issue search warrants. Indeed, the language of the plurality cannot but encourage negligent behavior, a hardly laudable characteristic of judicial conduct. Common sense tells me that greater care will be encouraged if the rule remains as it is, viz., evidence seized under an invalid warrant will be suppressed.

2. Prior Federal precedent. Acknowledging, as the plurality does, that the exclusionary rule has not been applied in all circumstances by the Supreme Court of the United States, does not answer the question whether it should be applied in this instance. Admittedly, the Supreme Court has refused to extend the exclusionary rule beyond that established in Mapp v. Ohio,

367 U.S. 643 (1961). See Alderman v. United States, 394 U.S. 165, 175 (1969) See also, cases cited by the plurality, supra at n.13. The Supreme Court, however, has continued to apply "judicially created means of effectuating the rights secured by the Fourth Amendment." Stone v. Powell, 428 U.S. 465, 482 (1976). Even those on the Supreme Court who have criticized the exclusionary rule have recognized that the rule should not be eliminated, absent a satisfactory alternative means of protecting Fourth Amendment values. Thus, despite the minority views cited by the plurality opinion, the Supreme Court has not taken the step the plurality appears to favor. Indeed, there is some recent indication that the Court would not accept a good faith exception to the exclusionary rule. See

Taylor v. Alabama, 102 S. Ct. 2664, 2669 1982) (expressly rejecting any good faith exception to exclusion of confession that was fruit of an illegal arrest).

The cases that have discussed a good faith exception to the exclusionary rule are significant to the points I have made. See Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Peltier, 422 U.S. 531 (1975). In the Peltier case, the Court allowed admission of evidence obtained from a search and seizure where the officers had conducted the search in good faith reliance "upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval." Id. at 541. Similarly, in DeFillippo, supra, the Court allowed admission of evidence

seized pursuant to an arrest under an ordinance which was subsequently found invalid. So long as "the arrest was valid when made, the search was valid and the [contraband was] admissible in evidence." 443 U.S. at 36. In both Peltier and DeFilIippo, the searches were valid under the then existing law, and, more importantly, there were no search warrants involved. In the instant case, the search was invalid from the beginning.[9/] It is one

---

9/ The plurality's reference to the "good faith" exception relied on in United States v. Williams, 622 F.2d 830 (5th Cir. 1980 (en banc), cert. denied, 449 U.S. 1127 (1981), is less than illuminating. The court in Williams stated: "No warrant is involved here, hence nothing that we say applies to factual situations where one has been obtained." Id. at 840 n.1. Additionally, the Williams majority made it clear that good faith alone was not sufficient; the officer's acts had to be "reasonable" as well. Id. at 841 n.4a. No justification can be found in Williams for applying its principle to negligent acts, such as are here involved.

thing to consider the reasonable good faith of law enforcement officials who proceed according to then existing legal

---

The decision in Williams was "unusual." Abell v. Commonwealth, 272 S.E.2d 204, 210 (Va. 1980). Sixteen members of the twenty-four judge court held that evidence seized incident to an arrest should not be suppressed because the arrest was valid. 622 F.2d at 839. Thirteen members of the court, including some of those who joined in the first holding, united in an alternative holding that even if the arrest were invalid, the exclusionary rule would not be applied because the officer acted under a reasonable good faith belief that the arrest was lawful. Id. at 846-847. Ten judges, in a concurring opinion, including some of those who joined in the first holding, objected to the majority's alternative holding. The concurrers chastised the court for lack of judicial restraint in writing an alternative holding not necessary to resolve the case, as the entire court agreed that the arrest was valid. The concurrers also asserted that the conclusions reached by the court in the second holding were supported only by dissenting opinions and law review articles. The Williams case has had, at best, a sparse following. Most importantly, the Williams court was dealing with reasonable conduct, not the kind of conduct here involved.

standards that are later changed, and another to consider, in hindsight, the good intentions of a judge who issued a clearly defective warrant that was invalid at the time issued and is still invalid today. "[C]learly there is a crucial distinction between withholding [the exclusionary rule's] cover from individuals whose Fourth Amendment rights have not been violated -- as has been done in the 'standing' cases, . . . Jones v. United States, 362 U.S. 257 (1960) -- and withdrawing its cover from persons whose Fourth Amendment rights have in fact been abridged." United States v. Calandra, 414 U.S. 338, 364-365 (1974) (Brennan, J., dissenting).

Even assuming that there was a good faith exception for judicial error, it would not apply in this case. Permeating the plurality opinion is the

assumption, which is plainly stated at one point in the text, supra at , that the judge acted "negligently but in good faith." This is a contradiction in terms. The plurality acknowledges that the judge's error "was a serious omission of constitutional significance." Supra at n.17. In the circumstances of this case, such error stemmed from a failure on the part of the judge to exercise reasonable case in issuing the warrant. Obviously, the judge did not read the warrant before handing it over to the police. Such behavior cannot be characterized as "good faith." Indeed, Justice Rehnquist, the most vehement critic of the exclusionary rule on the Supreme Court of the United States, has recognized that the deterrent function of the exclusionary rule is served by

proscribing negligent as well as wilful behavior: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." Michigan v. Tucker, 417 U.S. 433, 447 (1974). In order to be viewed as being in good faith, official action, though later proved to be erroneous, must have been undertaken with a greater degree of care than was

exhibited in this case. See note 6 supra.

The recent opinions questioning the purposes and functions of the exclusionary rule, as it applies to good faith errors by arresting or searching officers, stress the problems that the exclusionary rule "poses to the policemen who must act on the firing line (unfortunately too often literally so) and under the need to make immediate law enforcement decisions without the luxury of deliberation." United States v. Santucci, 509 F. Supp. 177, 182 (N.D. Ill. 1981), rev'd on other grounds, 674 F.2d 624 (7th Cir. 1982). The pressures of law enforcement cannot serve as an adequate basis for excusing judicial error. Cf. Santucci, supra at 182-183 (United States Attorney cannot invoke "policemen in the field" good faith

exception to the exclusionary rule).

3. Judicial integrity. Although the plurality opinion asserts that the notion of preservation of "judicial integrity fails as a substantial, independent support for the [exclusionary] rule," supra at , it fails to address adequately whether the imperative of judicial integrity, in this particular instance, would support invocation of the exclusionary rule. See Stone v. Powell, supra at 485 (judicial integrity has limited role in determining whether to apply exclusionary rule in a particular context). "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." United States v. Janis, 428 U.S. 433, 458-459 n.35 (1976).

One need only turn to history to recognize the dangers to society if the judiciary cannot, or will not, diligently and carefully protect the rights of individuals. See Marsh, Some Aspects of the German Legal System Under National Socialism, 62 L.Q. Rev. 366 (1946); Roetter, The Impact of Nazi Law, 1945 Wis. L. Rev. 516. See also Korematsu v. United States, 323 U.S. 214 (1944); L. Tribe, American Constitutional Law 1000 (1978).

The imperative of judicial integrity strikes me as being at the very core of Fourth Amendment values. It is appropriate to note, in this context, the impressive words of the Constitution of the Union of Soviet Socialist Republics:

"Article 55. Citizens of the USSR are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it.

"Article 56. The privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications is protected by law.

"Article 57. Respect for the individual and protection of the rights and freedoms of citizens are the duty of all state bodies, public organisations, and officials.

"Citizens of the USSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and property."

Constitution of the Union of Soviet Socialist Republics, in 16 Constitutions of the Countries of the World 29 (A. Blaustein & G. Flanz eds. 1982).

We take for granted the meaningless nature of these words because the courts of that nation cannot, or will not, implement them to protect the rights of their citizens. In contrast, John Adams said of James Otis's argument against the colonial writs of assitance that "[t]hen and there was the first scene of

the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born." 2 Legal Papers of John Adams 107 (L. Wroth & H. Zobel eds. 1965).

In this case, the goal of preserving judicial integrity is a sufficient justification for applying the exclusionary rule, since it is a judge who committed the violation. "It is the duty of [judges] to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." Boyd v. United States, 116 U.S. 616, 635 (1886).

What becomes of judicial integrity when three members of this court appear to condone the egregious judidcial error involved in this case? And what is left of the most significant protection embedded at the core of the Fourth

Amendment and art. 14 values, namely, the role of a neutral and detached magistrate in determining the validity and terms of a search? See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Connally v. Georgia, 429 U.S. 245 (1977); Shadwick v. Tampa, 407 U.S. 345 (1972); Coolidge v. New Hampshire, 403 U.S. 443 (1971). The crucial role of a magistrate is to determine whether probable cause for a search warrant exists and, just as importantly, to describe with particularity the place to be searched and the things to be seized. Stanford v. Texas, 379 U.S. 476 (1965). Marcus v. Search Warrant of Property at 104 E. Tenth St., Kansas

City, Mo., 367 U.S. 717 (1961).[10]

The particularity requirements of the Fourth Amendment are "precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." Stanford v. Texas, supra at 481. In the instant case, the plurality condones "a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the

---

10/ One should not have to add that, in every one of the decisions cited here which involve a defective warrant issued by a magistrate, the fruits of the search conducted under the authority of the defective warrant were suppressed.

people against such unauthorized action." Weeks v. United States, 232 U.S. 383, 394 (1914). Although "[t]he criminal goes free, if he must, . . . it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. at 659.

The language the plurality opinion uses in reaching the correct result mandated by State and Federal law does unnecessary harm to a body of law now well-established in our jurisprudence. The case is "serious" but there is nothing "challenging" about this issue except the plurality's unnecessary and unhappy incursion into a field of law well rooted in American history. One cannot but wonder as to the purpose of

such treatment of an issue so clear cut. It would be well to keep in mind that what was involved here is a search of a home, the most sacrosanct of places under Fourth Amendment jurisprudence. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home -- a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'

Silverman v. United States, 365 U.S. 505, 511 [1961]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." Payton v. New York, 445 U.S. 573, 589-590 (1980). The violations of the Fourth Amendment and our State laws involved here were not merely "negligent." They were inexcusable.[11/] The warrant was clearly defective. The search of this

---

11/ I point out also that despite the plurality's attempt to excuse the conduct here on the ground that the defendant was "at liberty" (supra at) and that there was need for "prompt action" (supra at n.17), the evidence shows that an arrest warrant had been issued for the defendant, and that the police knew he was not at home and dispatched a team of officers who arrested him at another place at the same time the search under the defective warrant was conducted.

dwelling was as though without a warrant. The evidence illegally obtained as a result must be suppressed without question.

APPENDIX

To the Justices of the Muncipal Court of ~~Dorchester~~ ROXBURY District , holden in said Dorchester District for the transaction of criminal business within the County of Suffolk:

_____of Boston_____

in the County of Suffolk, Police Officer, on oath informs the said Court, that he has reason to believe that any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, is kept or deposited by _____ OSBORN SHEPPARD _____ some person or persons unknown to the said _____ in certain rooms in the 2ND & BASEMENT

story of the building situated and numbered 42 in DECKARD ST., street in said city and within the judicial district of said Court and prays a Warrant to search there for the same

Received and sworn to before this Court, this 6TH day of MAY in the year of our Lord one thousand nine hundred and seventy NINE

Clerk.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, TO WIT:

To the Sheriff of our County of Suffolk, his Deputies and the Constables and Police Officers of the City of Boston in said County: Greeting.

We command you, and each of you forthwith, with necessary and proper assistants, to enter in the day time or in the night time in the _____ mentioned in the above information, and there diligently to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action, and to arrest the person or persons in whose possession it is found, together with all persons present if any of the aforesaid substances is found, and bring them before said Court to be dealt with according to law, and return this warrant with your doings thereon.

You are also commanded in like manner to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said substances and persons or either of them.

Witness, Joseph F. Feeney, Esquire, at Boston, in said Massachusetts Trial Court, Roxbury Division, this sixth day of May in the year of our Lord one thousand nine hundred and seventy nine

Signed,

Joseph F. Feeney
Trial Justices,
Massachusetts Trial
Court

LYNCH, J. (dissenting). It is undisputed that the search warrant used in this case to seize highly probative evidence linking the defendant to the murder of Sandra Boulware was formally defective. At issue in this appeal is the question whether the failure of the issuing magistrate to include in a search warrant, issued on probable cause, a list of the items to be seized or to incorporate such a list by reference to the police affidavit necessitates the application of the exclusionary rule where the search and seizure is limited to the items described in the affidavit. This court has concluded that the decisions of the United States Supreme Court mandate suppression of this evidence. Supra at , . I believe, however, that the majority's conclusion

represents a misreading of the relevant Supreme Court precedent and that its application of the exclusionary rule is inappropriate on the facts in this case. Accordingly, I dissent. I believe that a careful exploration of the purposes behind both the particularity requirement of the Fourth Amendment to the United States Constitution, which the police and judge inadvertently violated here, and the exclusionary rule demonstrates that the trial judge's admission of this evidence was proper on these facts.

The Supreme Court has noted that the particularity requirement was included in the Fourth Amendment to protect citizens from the general warrants and writs of assistance that were commonly used by the British against the colonists. Boyd v. United States, 116

U.S. 616, 624-627 (1886). These general warrants granted British officers unbridled discretion to search the place and belongings of the colonists and placed "the liberty of every man in the hands of every petty officer." Id. at 625. See also Marron v. United States, 275 U.S. 192, 195-196 (1927). The particularity requirement of the Fourth Amendment is directed at this specific evil. It requires that those searches that are deemed necessary should be as limited as possible: "[T]he problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). Also, evidence seized under a general warrant is unlikely to be supported by probable cause. Specificity in the

warrant limits the potential for such abuse. Id.

In the present case none of the evils associated with searches under such warrants occurred. At all times, Detective O'Malley and his colleagues conducted their search for evidence in a manner that scrupulously adhered to the limits that were specified in the affidavit and that they believed in good faith the judge had authorized. The police searched only in the places particularly described in the warrant and they seized only the relevant murder evidence described in Detective O'Malley's affidavit. They neither assumed nor exercised any discretion in the search. The police officers sought prompt judicial approval for their search warrant and searched no further than specified in the affidavit. No

"rummaging" among the defendant's belongings occurred. In the face of the dedication shown by these police officers to the spirit and purposes of the Fourth Amendment, abstract fears of "general warrants" and "writs of assistance" are completely misplaced.

More importantly, even conceding that the detective's carrying the affidavit on his person rather than attaching it to the warrant rendered the warrant formally defective, I believe that application of the exclusionary rule to suppress the evidence seized brings about too harsh a result. The plurality opinion correctly points out that the substantial, and perhaps only, justification for the exclusionary rule relied upon by a majority of the justices of the Supreme Court is the goal of deterring unconstitutional

conduct by the police and other law enforcement personnel. Supra at . The plurality opinion also recognizes the existence of factors in this case which, in my opinion, militate against the application of the exclusionary rule. That opinion acknowledges that the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge; the defect in the warrant was not harmful to the defendant in the circumstances of the actual search; the search was conducted in the same way and with the same results as it would have been conduted if the warrant had not been defective; the error in the warrant consisted of the judge's failure, negligently but in good faith, to strike out certain clearly inapplicable

words printed on the blank form and to attach it to (or to incorporate by reference to the affidavit) a list of the items to be seized; the Supreme Court has not applied the exclusionary rule to a judge's error in such circumstances; there may be reasonable distinctions between police misconduct and the errors of magistrates; the judge's conduct was neutral and detached; he did not undertake the role of the police and become concerned with ferreting out crime; the exclusionary rule is not well tailored toward deterring judicial misconduct since the suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police; the defendant was not prejudiced by the magistrate's error; and various members of the

Supreme Court have made statements critical of the application of the exclusionary rule in particular circumstances (not unlike those found to exist here). Supra at - . The majority nevertheless concluded that the exclusionary rule requires the suppression of the evidence seized. I believe that the factors summarized above, which three members of this court apparently agree are of significance, compel the conclusion that the evidence seized at 2 Deckard Street need not be suppressed under the United States or the Massachusetts Constitution.

The Supreme Court has noted with concern that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept

from the trier of fact and the search for truth at trial is deflected." Rakas v. Illinois, 439 U.S. 128, 137 (1978). Frequently the evidence sought to be excluded is "the most probative information bearing on the guilt or innocence of the defendant." Stone v. Powell, 428 U.S. 465, 490 (1976). Consequently, "[a]pplication of the [exclusionary] rule . . . deflects the truthfinding process and often frees the guilty. The [resulting] disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for

Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." Id. at 490-491.

To minimize the social cost resulting from the indiscriminate application of the exclusionary rule, the Supreme Court has held that this judicially made rule is not coextensive with the Fourth Amendment. Stone v. Powell, supra at 486, 488-489. United States v. Calandra, 414 U.S. 338, 347-348 (1974). Rather than applying the exclusionary rule reflexively, the Court has stated that judges should weigh the value of deterrence of police misconduct gained in applying the rule against the "further encroachment upon the public interest in prosecuting those accused of crime and having them

acquitted or convicted on the basis of all the evidence whioh exposes the truth." Stone v. Powell, supra, quoting from Alderman v. United States, 394 U.S. 165, 175 (1969).

Thus, it is clear that the policies underlying the exclusionary rule are not absolute and they must be evaluated in light of competing considerations: "As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." Calandra, supra at 348. Here, application of the exclusionary rule will serve no beneficial purpose. Police misconduct will not be deterred because none occurred. The human error committed by the judge harmed no rights of the defendant, as nothing beyond the

evidence listed in the affidavit was searched for or seized. By contrast, application of the exclusionary rule will result in the very substantial harm of withdrawing highly probative evidence from the trier of fact.

In discussing the need for applying the exclusionary rule under the Fifth Amendment to the Constitution of the United States, the Supreme Court has cautioned that before we penalize official misconduct we must consider whether the sanction serves a valid and useful purpose. Michigan v. Tucker, 417 U.S. 433, 446 (1974). I can perceive no valid and useful purpose for applying the exclusionary rule to the good faith search and seizure performed by the police here, albeit under a defective warrant. The failure of the judge or the police to attach the affidavit to

the revised warrant form was merely a harmless error, but under the majority's holding the consequences are Draconian: for want of a staple, highly probative evidence is lost. Such dedication to rigid formality is commanded neither by the Constitution nor by logic. I respectfully dissent.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.		SUPERIOR COURT NO. 026071
COMMONWEALTH	)	MEMORANDUM CONTAINING
	)	FINDINGS OF FACT
vs.	)	RULINGS OF LAW RE
	)	DEFENDANT'S
OSBORNE SHEPPARD	)	MOTION AND AMENDED MOTION TO SUPPRESS

* * * * * * * * * *

Statement of the Case

The defendant Osborne Sheppard awaits trial upon the above numbered indictment which presents murder in the first degree. Presently, the defendant urges both a Motion to Suppress physical evidence which was filed on February 21, 1980 and an "Amended Motion" seeking suppression of certain oral statements

SEP 26, 1980
Filed.
Ronan J.
Attest: T. Bakas
Asst. Clerk

allegedly made by him during a claimed custodial inquiry on May 5, 1979. The grounds advanced for the suppression of the physical evidence are that the items that were seized were taken pursuant to the authority of a search warrant that both as to form and content is so defective as to be a nullity; and, alternatively that an examination of the affidavit supporting its issuance reveals a lack of probable cause. With respect to the arguments advanced for suppression of the oral statements, the grounds relied upon are a failure to comply with the requirement of Miranda in that an alleged custodial interrogation without a prior constitutional advices of rights was had and, in any event, that interrogation was a detention offensive to the fourth

amendment under the rationale of Dunaway v. New York U.S. (1979).

Findings of Fact

1. As of May 5, 1979 there had been multiple homicides that had occurred in the Roxbury section of Boston. There had been ten or eleven young black female victims murdered in the span of approximately four months. These incidents were understandably a matter of extreme community interest. The events received considerable newspaper attention and other public coverage. In response to these several concerns, the Boston Police had placed its District 2 detective personnel on double shifts and, or, overtime in an attempt to discover the perpetrators of these crimes and thereby restore peace and order to the community.

2. In the early morning hours of May 5, 1979 (sometime at or about 5 A.M.) the body of the tenth (or eleventh) victim was discovered in a vacant lot within Roxbury. The body had been burned and the responding officers observed a patch of material and length of wire attached to the leg of the corpse. The Police Commissioner, one Jordan, and the District 2 detectives gathered at the scene before 6 A.M.

3. An intensive police effort commenced. First attempts were made to identify the visibly unrecognizable body. A detective Montgomery began knocking on neighborhood doors to discover whether nearby residents had observed anything. Later, he was furnished with a photograph of a woman who, police thought, might possibly have been the victim. Montgomery started

asking questions in various local establishments seeking to find anyone who might recognize the woman in the photograph. While making this routine inquiry within a bar, a patron approached and related that the woman depicted was acquainted with his girlfriend. After being unable to reach this person on the telephone, Montgomery went to the address furnished by the patron only to learn that other police had already contacted her and that she was then at the police station.

4. At some time around midday, Sgt. Albert Bornstein, Chief of District 2 detectives summonsed all teams working on the homicide to a briefing session. Bornstein informed the collected detectives that the victim was thought to be a Sandra Boulware, that a positive identification of the body had been

obtained, and, among other things, that Bornstein wanted to interview one "Jimmy Sheppard" who might have been a boyfriend of the deceased. Montgomery knew Sheppard from prior contacts with him. He knew him as a gambler, a so-called "gaming man". Montgomery and his partner cruised the neighborhood, looking for a red and black automobile which Montgomery thought was owned by Sheppard. He looked around the general area of several locations where he though he might find him (even passing by 158 Whitfield Street). At approximately 5 or 6 P.M. he decided to enter the Whitfield Street premises notwithstanding the fact that there was no red and black car to be seen in the area.

5. Montgomery, accompanied by his partner Brad Jones, knocked on the door

which was opened by the defendant. Montgomery spoke first. "Jimmie, you're just the fellow I am looking for", to which Sheppard responded either "Well, you're looking at me" or "Are you looking for me?" Montgomery then gave him the reason. Sgt. Bornstein wanted to ask him, Sheppard, some questions and requested he come to the station. The defendant replied, "Let me get my coat". He went from the first floor to the second. Montgomery also went upstairs. The card players were gathering there. Montgomery moved to relieve any anxiety and told them that his visit wasn't a gaming raid and that he wasn't interested in them. Sheppard had retrieved his coat by this time and the two left. When they got outside Montgomery did not (contrary to the defendant's contention) handcuff him or

ride with him in the back seat. Montgomery who rode in the front passenger seat took out his Miranda card and read it to Sheppard who was seated alone in the back of the unmarked automobile.

6. I find that at this time Sheppard was well aware of his constitutional rights. He was fifty-five years of age. He had considerable prior experience with police officers and police investigations. On May 5, 1979, prior to Montgomery's recital, Sheppard well knew he had a constitutional right to remain silent, that anything he said could be used against him, that he had a right to a lawyer, and that if arrested he had a right to use the telephone. He was alert and not under the influence of any narcotic or alcohol. Perhaps it

should be noted he was about to act as a dealer in a card game with "gaming men" hardly a casual activity where mental dullness or lack of alterness is long tolerated. Montgomery commenced to ask Sheppard about his whereabouts on the morning of May 5, 1979. Sheppard who has described himself as rather "well read and well versed" and certainly who is intelligent and articulate, asked what it was all about. Montgomery replied, "Do you know Sandra Boulware" to which Sheppard affirmatively responded. Montgomery stated, "She is no longer with us".

Montgomery inquired at considerable length of Sheppard, all as more fully appears from Exhibits 16 and 17, while traveling from Whitfield Street to the police station. This court finds that Sheppard was well aware of the extent

and scope of his rights and having just been re-informed by Montgomery decided to respond and answer questions. He knew that the police were investigating the death of Sandra Boulware and was interested in exploring his relationship with her and in determining his whereabouts and activities at least on May 4 and May 5, 1979. He had been arrested on previous occasions. He knew that he was not in custody. His will had not been overborne. He made a rational, strategic decision. He had not been intimidated, and his waiver was voluntary.

7. When Sheppard arrived at the station, Montgomery brought him to Bornstein's office and introduced them. Bornstein told him he was investigating the homicide of Sandra Boulware and wanted to interview him. Sheppard

agreed. He noticed that Bornstein had an additional black police officer come into the room. Sheppard thought that Bornstein was "diplomatic" to do so since it meant that three black and three white officers were then present. Bornstein asked if he could interview Sheppard on tape. Sheppard agreed. Since Bornstein's investigation had not forcused upon Sheppard and since he considered Sheppard's visit to be voluntary, he did not repeat the Miranda warnings given earlier by Montgomery.

On the tape Sheppard has a deep, rich baritone voice that presents some audible amplification difficulties. However, his voice and vocal demeanor are cool, reflective and calm. His answers were coherent and directly responsive to the questions as posed. Sometimes his answers were cryptic, but

often, after a reflective pause, he voluntarily enlarged upon the same. Sometimes he made unsolicited observations. The tape is without a trace of confusion, intimidation, anxiety or uncertainty. On the contrary the vocal impression gleaned from the tape is that of a speaker in full, firm, patient and collected demeanor and in an easy fluid manner making clear and lucid responses to the inquiries put. Sheppard knew that he had a right to decline to be interviewed. He also knew that any answer given could later be used against him. He well knew he could secure the service of a lawyer prior to any questioning. He had past familiarity with arrest and booking procedures. Notwithstanding his presence within a police station, he was under no coercive, or harassing

influence. His decision was unfettered and free. He decided to be interviewed on tape. It is apparent from the same tape that he was comfortable and confident with his decision during the recording that followed. He depicted himself as one who knew that he hadn't done anything wrong.

8. When the interview was concluded Bornstein thanked Sheppard for his cooperation and the defendant left. Perhaps it should be noted that the victim had another boyfriend whose possible information was of some initial interest to the investigators.

9. The police continued their investigatory efforts and as a part of that effort, interviewed, among others, Elbert Robinson, Finley Robinson, a cook by the name of Howard Bruger, the defendant's brother and sister-in-law,

and a Philip Barros. The information solicited contradicted in many particulars the information furnished earlier by Sheppard. The investigation quickly began to focus upon the defendant.

10. The police had secured information that Sheppard had borrowed an automobile, a black "T-Bird" of an unknown year from Barros and was in possession of it between 3:00 A.M. and 5:00 A.M. on May 5, 1979. When the police found Barros, they asked him to inspect the vehicle. Stains were observed. A chemist, called for the purpose, determined these stains were human blood stains. These were found both upon the rear bumper and within the trunk compartment. Also found within the trunk were certain strands of wire. Barros told Detective Peter J. O'Malley

that when he last used the car on Friday night he had placed a box of apples in the trunk and that there no stains in the trunk or on the bumper at that time. This was shortly before he let Jimmy Sheppard use the car. The car inspection and the interview with Barros took place sometime on Sunday morning.

11. Therefore, at about noontime on Sunday, May 6, 1979 Detective O'Malley drafted the affidavit that is now Exhibit No. 2 herein. The affidavit was intended to support his subsequent application for a search warrant so as to permit the inspection of the premises occupied by Osborne Sheppard, upon the second floor of 42 Deckard Street, Roxbury, where the defendant lived with his mother and sister, and that portion of the cellar which the defendant controlled or utilized in connection

with a playroom or recreation room, in which, upon information furnished, the police believed that from time to time he entertained "woman friends...for social purposes...". When he had completed the affidavit, Detective O'Malley showed it to the first assistant District Attorney for Suffolk County and asked him to advise him as to its sufficiency. He was advised the affidavit set forth probable cause to support the issuance of a search warrant.

12. Because it was Sunday, there was neither immediate nor ready access to the courts. Although the District 2 Police Station is in close proximity to the Roxbury District Court, Detective O'Malley was informed that four attempts to contact either the clerk or assistant clerks were unsuccessful. In any event, Detective O'Malley and others searched

the station and attempted to find a suitable form of search warrant. Finally, from somewhere, they secured a form previously in use at "Dorchester District" entitled "Search Warrant", subtitled "Controlled Substance G.L. c. 276, §§1 through 3A". This search warrant, as subsequently issued, appears as Exhibit 1 herein.

Detective O'Malley was aware that the form of warrant found related to searches for controlled substances and needed to be adapted for his intended use. Therefore, he deleted the subtitle "controlled substance" with a typewriter.

13. Meanwhile, arrangements had been made so Detective O'malley might present his affidavit before a justice whose residence was in nearby West Roxbury. This judge had consented to affording the police an opportunity to

be heard immediately at his home. Detective O'Malley therefore made certain typed changes in the warrant form, as seen upon Exhibit 1. In that portion which comprises the complaint, he substituted "Roxbury" for the printed "Dorchester" and further typed in the name of "Osborne Sheppard" where a blank space was afforded for use in identifying the "keeper" or "depositor" of the controlled substance that the form as printed contemplated. Further, the detective typed in "2nd & basement" in a blank space provided for place; sought to be searched; also "42 Deckard St." in the blank space provided for a specification of the premises.

14. This court finds that the police had a legitimate reason and need for proceeding with all due dispatch. The defendant, who was at liberty,

customarily arose at midday. He spent his later afternoons and early evenings in the company of gaming men; and, indeed, with some of the persons whom the police had questioned after his recorded interview. It was probable that the defendant would, within hours, learn of the police discoveries, including their observations of the vehicle. Since the items the police sought, as set forth in O'Malley's affidavit, were all small, light, susceptible of easy destruction or quickly transportable, and, if they existed, were in an area in which the defendant had instant and private access, it was reasonable to anticipate an attempt to rid or remove any telltale articles. It was because of this urgency that the police were moving with dispatch.

15. Detective O'Malley arrived at the issuing magistrate's home on Sunday afternoon. He presented his affidavit and made oath as to its contents and signed it before that judicial officer. The Justice acknowledged the same and signed his name, all as presently appears on Exhibit No. 2. I find as a fact that the Justice concluded upon the affidavit that there was probable cause to order the search of the second floor premises occupied by Sheppard and that part of the cellar used either as a playroom or which was controlled by him. I further find that the Judge stated he would authorize the search as requested. Detective O'Malley offered the form and stated that he knew the form as presented dealt with controlled substances. He showed the Judge where he had crossed out the subtitles. He

asked the Judge if this form of the warrant could be adapted so as to provide authorization for the search requested. I find that the Judge stated to Detective O'Malley that he would make the ncessary changes so as to provide suitable form of search warrant. Whereupon, on the back of the warrant the Judge crossed out with a pen "Dorchester District" and wrote in "Roxbury Division, Mass. Trial Court". With respect to the command of the warrant, the Judge crossed out with pen the name of the judge and judicial district as it appeared in print and substituted thereof his own handwriting. Thereafter, he dated the warrant, signed it and delivered it to Detective O'Malley. Also, he gave the affidavit back to Detective O'Malley without making in the warrant any other

alterations or additions. I find, as a fact, as a reasonable inference that may be drawn from the evidence presented, that the issuing magistrate considered that portion of the form furnished which appears immediately above the command of the warrant and which was a form provided for a clerk's attestation of the fact a complaint had been made, as an integral part of the process he was then issuing. He informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested.[1/] Detective O'Malley then left the magistrate's home.

1/ Detective O'Malley also sought and secured an arrest warrant after he had been examined under oath by the same magistrate. No issue regarding the arrest warrant has been raised.

16. Thereafter, the search warrant was executed by a group of officers under the direction of Detective O'Malley. Sheppard was not home. The premises of the second floor apartment which was occupied by the defendant and the playroom in the cellar were searched. The search was had and accomplished within the limits that Detective O'Malley understood the warrant to permit. I find that O'Malley had the affidavit as well as the search warrant with him. The warrant was peacefully executed. The defendant's mother and sister were present at the time. O'Malley orally informed them of the fact that he had a warrant authorizing the serach of the second floor premises and cellar area occupied by the defendant. There was no evidence that either occupant asked to see it or

that it was read spontaneously to them.

17. Sheppard's bedroom was searched and certain items seized. When police entered into the cellar playroom area, they observed an open door leading into an adjacent unfinished area. The door was open. The door frame had a device which permitted it to be secured from within the playroom. There was no evidence of any other means of access to that area other than through the playroom. The police entered and searched the playroom. At or near the open door was a scatter rug containing blood stains. At or near the door opening were pieces of cement showing apparent blood stains. In the unfinished area most proximate to the door police observed women's earrings. Other articles, such as articles of clothing and wire, were found in a

depression in this cellar area. I find this cellar area to be an area under the control of Sheppard. It was about fifteeen feet from the door. I find that the search was within the limits that O'Malley understood the warrant to permit.

18. After the search was accomplished, O'Malley and one McConkey inventoried the items seized. (One of the items inventoried was a bed sheet which was removed from a trash barrel found outside the dwelling.) O'Malley made his return to the Roxbury Court on Monday morning.

Rulings of Law

With respect to the tangible articles seized by the police on May 6, 1979 from the second floor bedroom of Osborne Sheppard and the cellar area,

there are two contentions advanced.

The initial contention considered is that the affidavit fails to establish probable cause. This argument is without merit. First, the law is settled that the affidavit shall be read in a commonsense fashion and precision of language is not required. United States v. Ventresca, 380 U.S. 102, 108-109 (1965). Massachusetts had followed the federal lead holding that the contents will not be first dissected so that each resulting fragment shall be subjected to a hypertechnical test of its sufficiency standing alone. Commonwealth v. Steward, 358 Mass. 747, 751. Nor should the affidavit be reviewed from the point of view of a common law pleader. Commonwealth v. Pellier, 362 Mass. 621 (1972). Indeed, if police are to be encouraged, it seems

good policy to allow a certain leeway or leniency in the after-the-fact review of the application's sufficiency. Commonwealth v. Corradino, 368 Mass. 411, 416 (1975).

Of course, the same Fourth Amendment standard of probable cause is applicable to a search as it applies to arrest and this standard was acknowledged in Commonwealth v. Stevens, 362 Mass. 24 (1972) and restated in Commonwealth v. Tarver, 369 Mass. 302 (1975) and most recently in Commonwealth v. Cefalo, Mass. Adv. Sh. (1980) 1875, 1885-1886.

Probable cause must be shown within the affidavit without resort to extraneous evidence. By way of definition, probable cause exists wherever the facts and circumstances within the knowledge of the government and of which it has reasonably

trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. Carroll v. United States, 267 U.S. 132 (1925), Beck v. Ohio, 379 U.S. 89, 91 (1964). Massachusetts has used the phrase "prudent man" when discussing the sufficiency of the knowledge necessary. Commonwealth v. Miller, 366 Mass. 387 (1974). Also, the issuing judge has a right to draw inferences from the affidavit. Commonwealth v. Moran, 353 Mass. 166, 170.

Suffice to say that a review of the affidavit at issue showed that ample facts were averred which would support a reasonable belief in a prudent man that this defendant had committed murder. He was the last person who was known to have been in the company of the victim.

The contact was within five days of the discovery of the victim. The place was in Roxbury which was where the body was found. The defendant operated a borrowed vehicle in Roxbury at a time just before the body was discovered. Upon visual inspection within a day and one-half of the discovery of the body, blood stains were found upon that car and those stains were not present immediately before the defendant borrowed the car. Also, the inspection revealed rope and wire in the car and the deceased was found with wire wrapped about her person. In sum, the averments are sufficient to permit a man of reasonable caution to believe that it was probable that the crime of murder had been committed and that there was probable cause to believe this defendant to be the perpetrator.

The next issue is the validity of the warrant. The Commonwealth seeks to justify the search as one which was effected by a warrant valid on its face.

The language of the Fourth Amendment is clear and requires that "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article XIV of the Declaration of Rights to the Massachusetts Constitution requires that the warrant contain "...a special designation of the persons or objects of search arrest or seizure...with the formalities prescribed by the laws." Therefore, as has been often said, "nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 191,

196; see also Commonwealth v. Wojcik, 358 Mass. 623, 625 (1971).

A search warrant which described the property in greater detail than the affidavit has been upheld. Commonwealth v. Cuddy, 353 Mass. 305, 309 (1967). A search warrant may be read with the complaint where it is attached to the warrant to provide sufficiency of description of the place to be searched. Commonwealth v. Pope, 354 Mass. 625, 629 (1968). Further, there are circumstances where it is permissive that the affidavit and warrant may be read together. In Commonwealth v. Todesco, 363 Mass. 445 (1973), the affidavit was attached to the warrant and the warrant made specific reference to the affidavit. It was held the requirement of specificity could be met by a reading of both. A wiretap warrant

which omitted the fifteen-day limit was considered valid since the warrant could be read in conjunction with the application which sought the fifteen-day authority. Commonwealth v. Vitello, 367 Mass. 224, 271-272 (1975). In that case it was thought significant that the police officer who made the affidavit was involved in the execution of the warrant. This was because he could be deemed to be aware of the limitations on the warrant. Moreover, an inadequate or ambiguous warrant description has been deemed sufficient by a reading of the affidavit and by the fact of "the knowledge of the officers on the scene". Commonwealth v. Rugaber, 369 Mass. 765, 769 (1976). It has most recently been suggested that the affidavit may be read along with the warrant to establish sufficiency of

description even without physical attachment but where there was accompaniment. Commonwealth v. Taylor, Mass.App.Ct.Adv.Sh. (1980) 1653, 1657.

The argument of the Commonwealth fails to be persuasive. There are similarities between the case at bar and Commonwealth v. Vitello, supra, in that the omissions from the wiretap were found by the trial judge to be as a result of "error and inadvertence" just as this court has found the omissions in the warrant to be inadvertent and in error. Likewise the officer executing the warrant in this case was the affiant and he possessed the unattached but accompanying affidavit. The reason the government's contention fails is that in every case in which a document has been utilized for the purposes of providing the requisite particularity, the basis

has been that the warrant has used some suitable terms of reference which have supported the incorporation of the document. This has been plainly stated in the federal circuit which includes Massachusetts. Application of Lafayette Academy, Inc., 610 F.2d 1 (1st Cir. 1979); United States v. Klein, 565 F.2d 183 (1st Cir. 1977). Furthermore, although not necessary to the holding, this principle has been approvingly articulated in Commonwealth v. Accaputo, Mass.Adv.Sh. (1980) 1009, 1019.

Therefore, the warrant at issue is fatally defective. The remaining issue becomes whether or not given the circumstances of this case the exclusionary rule should not be applied.

An examination of this judicial creation may be helpful. In contrast to the Fifth Amendment's direct command

against the admission of compelled testimony the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation. Until 1914 there was no barrier to the introduction in criminal trial of evidence obtained in violation of the Amendment. Adams v. New York, 192 U.S. 585 (1904), Commonwealth v. Dana, 2 Metcalf 329, 337 (1841). In Weeks v. United States, 232 05383 (1914) it was held that the Fourth Amendment alone may be a basis of excluding evidence at a federal criminal trial of evidence illegally seized by a federal officer. The Weeks holding, however, did not apply to state officiers and material unconstitutionally seized by a state officer could be admitted in a federal criminal proceeding. This became known

as the "silver platter" doctrine. Lustig v. United States, 338 U.S. 74, 78-79 (1949). Thirty-five years after Weeks, the right to be free from arbitrary intrusion that is protected by the Fourth Amendment is "implicit in the concept of ordered liberty and as such enforceable against the states through the [Fourteenth Amendment] "Due Process Clause." Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). The Wolf court however did not impose the Weeks exclusionary rule upon the states "as an essential ingredient of that right." See Wolf supra at 29. The test became whether the means used by a state were sufficiently offensive to the concept of ordered liberty as to make the admission of the evidence a violation of the Due Process Clause. Rochin v. California,

342 U.S. 165 (1952), Irvine v. California, 347 U.S. 128 (1954).

Thus as matters stood throughout most of the nineteen-fifties, the Fourth Amendment was applicable to the states, but a state could allow an official to engage in a violation thereof and, except in the most extreme case, avoid judicial sanction. To compound the problem, federal authorities, if they happened upon a state so inclined could profit from the state's action by receiving the unconstitutionally obtained evidence on the silver platter. Therefore, in retrospect, it was not surprising that in 1960 the Supreme Court exercised its "supervisory power over the administration of criminal justice in the federal courts" and barred from federal trials evidence improperly seized by state officers.

Elkins v. United States, 364 U.S. 206, 216 (1960).

One year later the exclusionary rule was made applicable to state criminal trials Mapp v. Ohio, 367 U.S. 643, 655 (1961). The Mapp majority justified the application of the rule to the states on several grounds (i.e. prevention of introduction of evidence where the introduction is tantamount to a coerced confession; deterrence of Fourth Amendment violations; preservation of judicial integrity) but principally upon the proposition that exclusion would deter future unlawful police conduct.

The debate within the Court upon the exclusionary rule has been considerable. However, it is clear and plain that the contention that the exclusionary rule is somehow coextensive with the Fourth Amendment is simply

inaccurate and false.

> "In sum the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved".
>
> United States v. Calandra, 414 U.S. 338, 348 (1974).

Because the exclusionary rule is "strong medicine" care should be had in prescribing it for all ills and the majority of the Supreme Court has exercised caution. Early on, the Court developed standing requirements in a balancing process between two competing social concerns, "the interest that the public has in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth",

Alderman v. United States, 394 U.S. 165, 174-175 (1969) as against the particular individual's right not to be the subject of an arbitrary intrusion upon his person or private effects, Brown v. United States, 411 U.S. 223 (1973). To state it another way, in deciding whether or not the exclusionary rule shall be applied, one first must recognize that the policies behind the rule are not absolute but relative. There is a balancing to be had between the strong public interest in truth at trial on the one hand, and an incremental contribution to the protection of Fourth Amendment or Fifth Amendment values. Therefore, although there is some dispute among the individual judges as to where the line should be drawn, the great majority of the Justices employ this reasoning or

balancing procedure and the results are easily understandable even if disputed. Cases clearly illustrate that process. Harris v. New York, 401 U.S. 222 (1971); United States v. Calandra, 414 U.S. 338 (1974); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Peltier, 422 U.S. 531 (1975); United States v.Jones, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Ceccelini, 435 U.S. 268 (1978); Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Caceres, 440 U.S. 741 (1979); Michigan v. DiFillipo, 443 U.S. 31 (1979), and, Yberra v. Illinois, U.S. (1979).

The nineteen-seventies has been a time wherein the Supreme Court has been establishing the parameters of the exclusionary rule which it judicially

earlier fashioned and made applicable to the states in the nineteen-sixties.

In this case the police sought a warrant. The affidavit was submitted to an official from the District Attorney's office for a determination as to its adequacy from the point of view of probable cause. There was proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search. The police had adequately described with constitutional specificity the places to be searched and the items to be seized. The police presented a form which was the only form of warrant available to them. The magistrate said he could adopt it. Thereafter the actual search undertaken was eithin the limits of the

authority the police thought reasonably had been granted.

The Commonwealth in this case places great emphasis on United States v. Williams, F2 (5th Cir. 1980) in which there appears a well reasoned justification for a good faith exception to the application of the exclusionary rule. The case is persuasive. However, of even greater weight is Commonwealth v. Rugaber, 369 Mass. 765 (1976). In a situation where law enforcement officials acted mistakenly but upon probable cause and in good faith and which presented a factual situation in which exclusion would have no deterrent effect stated:

> In these circumstances we agree with the judge who ruled that even if the warrant was defective, the exclusionary rule should

not be applied since it could have no deterrent effect. Commonwealth v. Rugaber, supra at 769

Likewise in this case, if police officers undertake their duties properly, they will act in the same fashion in similar circumstances in the future and the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function.

Therefore, the evidence seized in this case is admissive notwithstanding any defect in the warrant

Based upon the facts found above, this court now rules that the statements made on May 5, 1979 at the District 2 Police Station were freely and voluntarily made.

Miranda warnings must precede police questioning whenever the person is "deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Suffice to say this court has found as a fact that the defendant was afforded his Miranda warnings by Montgomery before any police interrogation was had.

Therefore the issue is whether or not there was a knowledgeable waiver.

In reference to Miranda issues, trial courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464. The determination of whether there has been an intelligent waiver depends in each case upon the particular circumstances and facts of the matter, including the background, experience and

conduct of the defendant. The Commonwealth has a "very special and heavy burden" of showing the defendant knowingly and intelligently waived his right to silence and counsel Commonwealth v. Cain, 361 Mass. 224 (1972). Station house inquiry, since it is generally most conducive to successful inquiry, is particularly scrutinized. Commonwealth v. Hass, 373 Mass. 545 (1977).

In reference to voluntariness, certain facts are obvious. The defendant was talkative from the outset. He was not misled. The questioning was not unduly long and he was not subjected to lengthy inquiry. He did not seek access to any friend, family or counsel. He did not indicate any physical or mental ailment. Sheppard was fifty-five years of age and

had prior experience with police practices sufficient to understand his position. He was not overawed. He was not intimidated. The essence of the ability to make a voluntary statement is the ability to make a free choice. In short, the statement must be the produce of a free will. Eisen v. Picard, 452 F.2d 860. Sheppard's self-preservation mechanism was operative. Pia v. United States, 397 F.2d 627, 634. This court finds that the statements made were the product of a rational intellect. Sheppard made the election to talk rather than exercise his right to silence. It was a strategic decision to present himself as a man with nothing to hide.

Many of the cases upon which this court relies were recently collected in Commonwealth v. Mahnke, 368 Mass. 662,

699-700 (1975) and there is no reason to set them forth herein.

This court concludes the statements made on May 5, 1979 by the defendant were made after a knowing and voluntary waiver of his Miranda rights.

Conclusion

The Motion to Suppress and the Amended Motion to Suppress are to be endorsed as follows: "The within motion be and hereby is denied for reason of findings made and rulings set forth in a memorandum of this date filed herewith."

Signed,

John T. Ronan
Justice of the
Superior Court

September 26, 1980

APPENDIX C

To the Justices of the Municipal Court of the [illegible] District
[illegible], holden at said
District for the transaction of criminal business within the County of Suffolk

[illegible] of Boston
in the County of Suffolk, Police Officer, on oath informs the said Court, that he has reason to believe that any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, is kept or deposited by [illegible]
[illegible] some person or persons unknown to the said
informant, in certain rooms in the [illegible] 2 FLOOR REAR
entry of the building situated and numbered [illegible] 43 [illegible]
in [illegible] STREET, [illegible] street
in said city and within the judicial district of said Court and prays a Warrant to search there for the same.

[illegible]

Received and sworn to before this Court, this [illegible] 5 TH day of
MAY in the year of our Lord one thousand nine hundred and seventy [illegible]

[illegible] Clerk.

Commonwealth of Massachusetts

SUFFOLK, TO WIT:

To the Sheriff of our County of Suffolk, his Deputies, and the Constables and Police Officers of the City of Boston in said County GREETING.

We command you, and each of you forthwith, with necessary and proper assistance, to enter in the day time or in the night time in the [illegible]
mentioned in the above information, and there diligently to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action, and to arrest the person or persons in whose possession it is found, together with all persons present if any in the aforesaid premises is found, and bring them before said Court to be dealt with according to law, and return this warrant with your doings thereon.

You are also commanded, in the manner, to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said substance and persons or either of them.

JULIAN F. FARLEY MAIL TO 1st Court Roxbury Division

Witness, [illegible] Esquire, at Boston, in said [illegible] this
[illegible] day of MAY
in the year of our Lord one thousand nine hundred and seventy [illegible]

[illegible] Judge of the First Court.

ADDENDUM TO SEARCH WARRANT
[illegible] STREET, BOSTON

[illegible]

Best Copy Available

SUFFOLK, ss. City or Boston, MAY 6, 1879.

By virtue of the within warrant I have this day entered and searched the within-described premises, and there and there found and seized 1 NAVY BLUE WOOL JACKET, 1 PR. WOOL SACK SOCKS • 1 PATCH OF HAIR • 1 PIECE OF TWINE • 1 PR. WOOL JOCKEY SHORTS • 1 STROPGAM STRAP • 1 PIECE OF DIRTY CLOTH • 1 PR WOMANS BLK LEGGINGS • 1 PIECE INSULATED WIRE • 2 WOMANS EAR RINGS • 600 PIECES OF CHECKIT WITH RED STAINS • PIECE OF PAPERING • PIECES OF PAPER WITH RED STAINS • PIECES OF 3 DIFFERANT SIZE OF WIRE • A WOMANS WHITE RIGHT SHOE • PIECE OF RUG • 1 SOCK WITH YELLOW STRIPES • 1 WOOL COLOR [illegible] • 1 RED SHIRT • 1 BLK TAPE • 1 BRANDY GLASS • 1 TELEPHONE •

and all of said [illegible] LIKEWISE [illegible]

now before said Court to be dealt with according to law.

Lucas McCoubrey, Police Officer.

No. 96
Roxbury Division
MUNICIPAL DISTRICT COURT.
COMMONWEALTH
vs.
SEARCH WARRANT.

Boston Officer.

Best Copy Available

APPENDIX D

Commonwealth of Massachusetts.

#1
9/15/11
KMcC

DISTRICT COURT DEPARTMENT — ROXBURY DIVISION

SUFFOLK, ss.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT
G.L. c. 276, ss. 1 to 7; St. 1964, c. 237

SUNDAY MAY 4 19 79

I, PETER J. O'MALLEY (Name and rank — or degree and title)

1. I am A DETECTIVE, BOSTON POLICE DEPARTMENT, ATTACHED TO DISTRICT D4 (Give police personnel, occupation, office, etc.)

2. I have information, based upon observation and/or [illegible] statements of witnesses and persons of information, a [illegible] personal knowledge and belief, as stated [illegible] a conference, [illegible] officers or [illegible] persons — AS SATURDAY 5/5/79 AT 5:00 AM THE BODY OF SAMIRA D. [illegible] WAS FOUND DEAD AND WRAPPED IN GREEN RUG, AT 24 HAZELWOOD ST. #2K. IN A [illegible] FIELD AT THE TIME SHE APPEARED TO BE ONLY PARTIALLY CLOTHED. IN THE COURSE [illegible] INVESTIGATION [illegible] WAS DETERMINED THAT ONE GEORGE SHEPPARD [illegible] RESIDED AT #2K. WAS THE LAST PERSON TO HAVE BEEN SEEN WITH SAMIRA. IN AN INTERVIEW GAVE TO DET. KENNETTEY, G.SHEPPARD STATED THAT HE AND SAMIRA WENT TO SHEPPARD ST. #2K ON 5/4/79 WHICH IS THE LAST TIME SHE WAS SEEN. THAT PRIOR TO GOING THERE, THEY HAD STOPPED AND BOUGHT 2 BOTTLES JACK GP/COKE AND A FIFTH OF WHITE LIQUOR. AFFIANT S IN THIS INVESTIGATION I HAVE ESTABLISHED THAT G. SHEPPARD [illegible] IS PARAPLEGIC OF A LONG DET. FORD [illegible]. MASS. REG. WAS 8TH PLACE [illegible] 100 OF TIME, ENDING JUST BEFORE THE BODY OF SAMIRA WAS FOUND. ALSO THAT THIS [illegible] WAS FOUND TO HAVE HUMAN BLOOD ON THE REAR BUMPER THAT WAS AT THAT PRIOR [illegible] HIS TAXI POSSESSION. ALSO IN THE TRUNK OF THIS CAB WERE FOUND VARIOUS PIECES [illegible] WIRE AND ROPE THAT MAY HAVE BEEN USED TO BIND PARTS OF HER BODY. PIECES OF WIRE [illegible] FOUND ON THE BODY. G. SHEPPARD HAS TOLD [illegible] KIDNEY CALIPS. A FRIEND, THAT IN [illegible] LAST HE WAS TAKEN UPSTAIRS TO HIS APT. [illegible] AT 24 HAZELWOOD ST. FOR SOCIAL [illegible] AND WAS ASKED TO USE THE [illegible] TO MAKE IT COMFORTABLE.

(Insert upon the foregoing sources of information — and upon any personal knowledge and belief — and enumerate as follows: as [illegible] property sought is [illegible] that the property enumerated [illegible] has been [illegible] and may be found in the possession of GEORGE SHEPPARD (Name of person or premises)

in premises 2 HAZELWOOD AT 24 HAZELWOOD ST. (Describe premises, vehicle, person, etc.)

4. The property for which I seek the issuance of a search warrant is the following: (here describe the property as particularly as possible) A FIFTH OF A WHITE LIQUOR, 2 BOTTLES JACK [illegible] A WOMENS JACKET THAT WAS WORN YESTERDAY AS WAIT-HERE (CHARCOAL) A PEACOCK RE OF SAMIRA D. ZAYLAAF. SEVERAL PIECES WIRE ALSO ROPE THAT MATCH [illegible] ON THE BODY OF SAMIRA D. ZAYLAAF, OR IN THE ABOVE [illegible] ANY LAUNDERED, [illegible] ANY LAUNDERING THAT MIGHT HAVE BEEN USED ON THE VICTIMS CLOTHING OR WOMANS [illegible] THEY MAY HAVE WASH, GASOLINE, STAINS ON THEM. ITEMS THAT MAY HAVE [illegible] OF THE VICTIM.

WHEREFORE, I respectfully request that the search which a warrant and order of seizure, accompanying the records of [illegible] premises and the person or persons of the complaint.

THE SECOND FLOOR AT 24 HAZELWOOD ST. #2K. AND THAT PART OF THE DUPLEX OCCUPIED BY GEORGE SHEPPARD. AT HAZELWOOD ST. IS A THREE STORY RED BRICK APARTMENT BUILDING WITH A BASEMENT THAT IS ATTACHED TO YELLOW A [illegible]

(Signature of complainant)

PETER J. O'MALLEY

This [illegible] subscribed [illegible] and sworn to before me this [illegible] day of [illegible] 19 [illegible]

Before me,

(Justice, Clerk)

(Notary Public) (Assistant Clerk)

(Title or qualification)

Best Copy Available

Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-963.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

JOINT APPENDIX.

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A. H. SMITH,
Assistant Attorney General, Chief, Criminal Appellate Division,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240
Attorneys for Petitioner

JOHN REINSTEIN,
Counsel of Record,
Civil Liberties Union of Massachusetts,
47 Winter Street,
Boston, Massachusetts 02108.
(617) 482-3170

NANCY GERTNER,
SILVERGLATE, GERTNER, BAKER & FINE,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663
Attorneys for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 4, 1982.
CERTIORARI GRANTED JUNE 27, 1983.

Appendix.

Table of Contents.

Docket entries	1a
Indictment	8a
Motion for evidentiary hearing	9a
Motion to suppress	10a
Affidavit of Osborne Sheppard	13a
Affidavit in support of application for search warrant	14a
Memorandum containing findings of fact and rulings of law re defendant's motion and amended motion to suppress	19a
Supreme Judicial Court Opinion	40a

Commonwealth vs. Osborne Sheppard,
alias James Howard, alias James Carter, alias Jimmy

NO. 026071

Offense: Murder — First Degree
Attorney: Peter M. Dowd 5-15-79 — 11-7-79 J. Herlihy,
307 V.F.W. Pkwy. — Appt. by Ct.
Chestnut Hill

Date of Filing

1979

May 14 Indictment returned.
Motion of the Commonwealth for warrant of arrest to issue — filed and allowed. Dwyer, J.
Warrant issued.
Copy of indictment and notice of the finding of indictment sent to the Chief Justice and Attorney General.
Copy of indictment with notice of finding of indictment and that it would be entered forthwith on docket of this Court sent by Clerk to Sheriff for services on defendant in Common Jail.

May 15 Brought into Court on a warrant.
Order of notice to prisoner of finding of indictment and entry on docket served on defendant by Sheriff filed.
Indictment read — pleads not guilty. Court orders defendant to recognize with double surety in the sum of $100,000.00.
Court orders defendant examined by the Court Clinic Psychiatrist as to competency to stand trial, criminal responsibility and to determine whether or not defendant is sexually dangerous. Case continued to

1979

May 15 May 25, 1979 for status report. Mittimus issued.
Dwyer, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for defendant.

May 25 Brought into Court — Psychiatric report received from Court Clinic Psychiatrist filed. Pre-trial conference ordered for June 25, 1979.
Dwyer, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for the defendant.

June 25 Case continued to June 29, 1979 for hearing.
Dwyer, J. - B. Dwyer, ADA - E. Goldberg, Court Reporter.

July 18 Brought into Court - pre-trial conference ordered for July 25, 1979, request of the defendant.
Ford, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for the defendant.

July 25 Continued, by agreement, to November 5, 1979 for trial.
Ford, J. - B. Dwyer, ADA - E. Goldberg, Court Reporter - P. Dowd, Attorney for the defendant.

Nov. 7 Brought into Court - Hearing Re: Appointment of Attorney John Herlihy before Brogna, J.
Defendant's petition for Assignment of counsel filed and allowed.
Attorney Dowd withdrawn by leave of Court.
Affidavit of counsel, filed.
Attorney John F. Herlihy, Jr. appointed to represent the defendant in accordance with Rule 53 of Superior Court.
Continued generally by agreement.
Brogna, J. - P. Buckley, ADA - H. McKenna, Court Reporter - J. Herlihy,
Attorney for the defendant.

1979

Nov. 15 Defendant files: Motion for disclosure of identification procedure;
Motion to inspect witnesses' statements;
Motion of the defendant to be furnished with exculpatory evidence;
Motion for statements of defendant;
Motion for production of Police Department reports;
Motion for inspection of Grand Jury minutes;
Motion for list of names and addresses of witnesses who were summonsed to testify before the Grand Jury;
Motion to examine photographs;
Motion to be furnished with statements of promises, rewards or inducements;
Motion for copy of autopsy report.

1980

Jan. 23 Defendant not in Court - Pre-trial conference ordered for January 31, 1980, report to be filed 2:00 P.M. Morse, J. - P. Buckley, ADA - E. Goldberg, Court Reporter - J. Herlihy, Attorney for the defendant.

Jan. 31 Defendant not in Court - Pre-trial conference report ordered for February 15, 1980. Morse, J. - B. Dwyer, ADA - E. Goldberg, Court Reporter - J. Herlihy, attorney for the defendant.

Feb. 15 Pre-trial conference report filed.

Feb. 21 Defendant files: motion for permission to hire an investigator;
motion for evidentiary hearing;
motion to suppress with affidavit thereon.

June 16 Defendant's amended Motion to suppress and Memorandum in support each filed by leave of Court. Brogna, J.

1980

Aug. 14 Commonwealth's Motion for physical and Psychiatric Examination of the defendant is filed and allowed by agreement of all parties.

Defendant's Motion for continuance to the week of September 15, 1980 is filed and allowed. Brogna, J. -S. Needle, ADA - J. Herlihy, Attorney for defendant.

Sept. 15 Brought into Court, hearing in re: Defendant's Motion to suppress (Paper # 20) and defendant's amended Motion to suppress proceeds before Ronan, J.

Sept. 16 Brought into Court, hearing in re; defendant's Motion to suppress (Paper # 20) and defendant's amended Motion to suppress continued before Ronan, J.

Sept. 17 Brought into Court, hearing in re: Defendant's Motion to suppress (paper 20) and defendant's amended Motion to suppress continues before Ronan, J. Upon completion of hearing, the same is taken under advisement. Ronan, J. N. Flanagan, D.A. - H. McKenna, Court Reporter - J. Herlihy, attorney for defendant.

Sept. 26 Court file Memorandum containing Findings of Fact and Rulings of Law re; Defendant's Motion and amended Motion to suppress (copies given to D.A. and Attorney) Ronan, J.

Sept. 29 Brought into Court, trial date set for October 14, 1980 by agreement of all parties, no further continuances. Ronan, J. - N. Flanagan by C. Garrigan, ADA - J. Herlihy, Attorney for defendant.

Oct. 14 Brought into Court, Court files Certificate of Protracted Trial ordering a Jury of not exceeding (16) members be impanelled.

Defendant files Motion in Liminie. Voir Dire selection of Jury proceeds before Ronan, J. - H. McKenna, Court Reporter.

1980

Oct. 15 Brought into Court, Voir Dire selection of Jury continues before Ronan, J.
Selection of Jury is completed. Jury taken on view. H. McKenna, Court Reporter.

Oct. 16 Brought into Court, defendant's Motion In Liminie, filed on October 14, 1980 is denied. Sequestration of witnesses is ordered.
Trial proceeds before Ronan, J. and Jury of 16. H. McKenna, Court Reporter.

Oct. 17 Brought into Court, trial continues before Ronan, J. and jury of 16. H. McKenna, Court Reporter.

Oct. 20 Brought into Court, trial continues before Ronan, J. and jury of 16. H. McKenna, Court Reporter.

Oct. 21 Brought into Court, trial continues before Ronan, J. and jury of 16, H. McKenna, Court Reporter.

Oct. 22 Brought into Court, trial continues before Ronan, J. and jury of 16, H. McKenna, Court Reporter.

Oct. 23 Brought into Court, trial continues before Ronan, J. and jury of 16.
Commonwealth rests case-in-chief.
Defendant's Motion for Required Finding of Not Guilty is filed and denied.
Defendant's Motion for appropriate Relief is filed and taken under advisement. H. McKenna, Court Reporter.

Oct. 24 Brought into Court, trial continues before Ronan, J. and jury of 16.
Defendant's Motion for appropriate relief is denied. Defendant rests.
Court orders that the jury be reduced to (12) in number, and the names of; Alice G. Palmer, Joseph P. Geremonts, Carl W. McBraver, Abraham Gilman were drawn and designated as alternate jurors and

1980

Oct. 24 placed in the custody of the Court officers. Jury locked-up for the evening. H. McKenna, Court Reporter.

Oct. 25 Brought into Court - Jury continues its deliberation - Verdict Guilty - Verdict Affirmed - Verdict Slip filed.
Defendant sentenced to be imprisoned to M.C.I. Walpole, for and during the term of his Natural Life.
Defendant notified of right to appeal in accordance with Rule 65.
Defendant deemed to have served 511 days of this sentence.
Mittimus issued.
Ronan, J. - N. Flanagan, D.A. - H. McKenna, Court Reporter - J. Herlihy, Attorney for defendant.

Oct. 31 Defendant files: Notice of Appeal.

Nov. 6 Notice sent to Attorney that we are accepting Claim of Appeal as notice of appeal.
Copy of notice of appeal mailed to Ronan, J. and N. Flanagan, D.A.
Letter sent to Court Reporters E. Goldberg and H. McKenna for preparation of transcripts.
Certificate of Clerk filed.

Nov. 26 One original transcript of evidence delivered to Clerk by E. Goldberg, Court Reporter.

1981

Jan. 9 One original transcript of evidence on September 15, 16, 1980 delivered to Clerk by H. McKenna, Court Reporter.

Jan. 19 One original transcript of evidence on October 14, 15, 1980 delivered to Clerk by H. McKenna, Court Reporter.

1981

Mar. 10 One original transcript of evidence on October 20, 21, 1980 delivered to Clerk by H. McKenna, Court Reporter.

Mar. 24 One original transcript of evidence on October 22, 23, 1980 delivered to Clerk by H. McKenna, Court Reporter.

May 6 One original transcript of evidence on September 17, October 24 and 25, 1980 delivered to Clerk by H. McKenna, Court Reporter.

May 15 Notice sent to attorneys that transcripts are available.

May 18 Certificate of delivery of transcript by Clerk - filed.

May 19 Certificate of delivery of transcript by Clerk - filed.

May 21 Notice of completion of assembly of record sent to Clerk of Supreme Judicial Court and attorneys for Commonwealth and defendant.

Two certified copies of docket entries, original and copy of transcript, two copies of exhibit list and list of documents, each transmitted to Clerk of Appellate Court. Attorney Herlihy and Newman Flanagan, District Attorney, each notified.

Commonwealth of Massachusetts.

SUFFOLK, ss. At the SUPERIOR COURT DEPARTMENT of the TRIAL COURT, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of criminal business, on the first Monday of May, in the year of our Lord one thousand nine hundred and seventy-nine.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

OSBORNE SHEPPARD, otherwise known as JAMES HOWARD, otherwise known as JAMES CARTER, otherwise known as JIMMY, on the fifth day of May, in the year of our Lord one thousand nine hundred and seventy-nine, did assault and beat one Sandra D. Boulware, with intent to murder her, and by such assault and beating did kill and murder the said Sandra D. Boulware.

A TRUE BILL.

/s/_____ /s/_____

Assistant District Attorney. Foreman of the Grand Jury.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO. 026071

COMMONWEALTH)
)
VS.) MOTION FOR EVIDENTIARY
) HEARING
OSBORN SHEPARD)

Now comes the defendant and moves that this Honorable Court order an evidentiary hearing on the defendant's previously filed motion to suppress.

The defendant assigns as reason therefor, the relevance and necessity of laying a complete factual basis for the allegations contained in his motion to suppress; the facts and circumstances for the issuance of the warrant and the interrogation of the defendant require the taking of evidence as they are not apparent from the warrant or affidavit itself.

By his attorney:

/s/_____
John F. Herlihy, Jr.,
Herlihy, Russel & Foehl
11 Beacon Street
Boston, MA. 02108
Tel. No. 723-6030

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
NO. 026071

COMMONWEALTH)
)
VS.) MOTION TO SUPPRESS
)
OSBORN SHEPARD)

1. On May 5th, 1979, at approximately 5 A.M. the body of one later identified as Sandra Boulware was found in an open field in Roxbury.

2. In the course of the police investigation that followed, the defendant was picked up by certain Boston police officers that same afternoon. He was taken to District 2 and was interrogated for over an hour by Detective Sergeants Bornstein and Kelly.

3. At no time during this custodial interrogation was the defendant advised of his constitutional rights, although it was apparent that he was the primary suspect in the homicide of Sandra Boulware.

4. As a result of information learned by police during their lengthy interrogation of the defendant, a warrant to search his residence at 42 Deckard St., Roxbury, was issued the following afternoon on Sunday, May 6, 1979.

5. Pursuant to said warrant, the police entered upon and searched the premises at 42 Deckard St. in Roxbury. They conducted a wide-ranging search of the second-floor apartment and entire basement area of said premises.

6. The return filed upon the warrant discloses that numerous articles of various description were seized including,

1 navy blue mens jacket; 1 pr. mens black boots; 1 patch of hair; 1 piece of tile; 1 pr. mens jockey shorts; styrofoam cup; 1 piece of dirty cloth; 1 pr. womans blk. leotards; 1 piece insulated wire; 2 womans ear rings; odd pieces of cement with brn. stains; piece of paneling; pieces of paper with red stains; pieces of 3 different kinds of wire; a womans white right shoe; piece of rug; 1 book with tel. numbers; 1 multi-color cloth; 1 bed sheet; 5 ash trays; 1 brandy glass; 1 telephone.

WHEREFORE, the defendant says that he is aggrieved by the above described actions of the Boston police and contends that he was the victim of an unlawful search and seizure. More specifically, the defendant alleges that his rights have been violated in that:

(a) The warrant issued in this case is defective on its face for it clearly authorizes only the search for controlled substances or related paraphernalia.

(b) The warrant and application in support thereof fail to comport with the statutory requirements of Chapter 276 § 1 in that the warrant itself refers only to controlled substances and the application describing the articles sought is improper and overbroad.

(c) The warrant in this case is defective on its face because it fails to name and describe that person or person to whom authority for the search is given.

(d) The warrant in this case is defective on its face because it inaccurately, ambiguously, vaguely and overbroadly describes the exterior of the premises itself and that portion of the interior which is specifically contemplated in the search.

(e) The application and affidavit in support of the application contain material misstatements of fact and uncorroborated hearsay and fail to properly set forth probable cause.

(f) The affidavit submitted in support of the warrant relies for probable cause almost completely on statements given to the police by the defendant himself during a custodial interrogation. No attempt whatsoever was made by the police to inform the defendant, who was clearly a suspect, of his constitutional rights. Therefore, all information derived from this interrogation was illegally obtained.

Now comes the defendant and based on the foregoing says that any and all property seized pursuant to the above described warrant be either returned to him or suppressed as evidence against him in this or any other proceeding.

The defendant further says that any and all statements that he may have made, and which were taken down and used as a basis for the issuance of a search warrant, be suppressed as evidence against him in this or any other proceeding.

And finally that the search warrant, application and affidavit in support thereof be declared defective and invalid, because they were obtained in violation of the defendant's rights to be secure from unreasonable search and seizure as guaranteed by the 4th Amendment to the Constitution of the United States and Article XIV of the Declaration of Rights to the Constitution of the Commonwealth of Massachusetts.

By his attorney:

/s/_____

John F. Herlihy, Jr.,
Herlihy, Russell & Foehl
11 Beacon Street
Boston, MA. 02108
Tel. No. 723-6030

AFFIDAVIT

I, Osborn Shepard, the defendant in the above numbered indictment being duly sworn, depose and say that I have been the victim of an unlawful search and seizure and also the victim of an unlawful police interrogation in that I was not advised, at any time during said interrogation, of my constitutional rights. I have been informed that the items mentioned in the return on the warrant issued for the search of my residence, which I contend was illegal, are intended to be used against me at my trial.

Signed under the pains and penalties of perjury this day of February, 1980.

/s/ _____
Osborn Shepard

Commonwealth of Massachusetts.

DISTRICT COURT DEPARTMENT — ROXBURY DIVISION

SUFFOLK, ss.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SEARCH WARRANT

G.L. c. 276, §§ 1 to 7; St. 1964, c. 557

SUNDAY May 6, 1979

I, PETER J. O'MALLEY being duly sworn, depose and say:

Name of applicant

1. I am a detective, Boston Police Department, Attached to District Two

2. I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (if space is insufficient, attach affidavit or affidavits hereto). On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Ware was found beaten and burned to death opp. 28 Hazelwood St. rox. In a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation this followed. It was determined that one Osborne Sheppard 42 Deccard St. Rox. was the last person to have been seen with Sandra. In an interview gave to Sgt. Bornstein, O Sheppard stated that he and Sandra went to Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickle bags of herb and a fifth of Ameretto liquor. Officers in this investigation have established that O. Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found and that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his taken possession, also in the trunk of this car were found various pieces of wire and rope that may

have been used to bind parts of her body, pieces of wire he found on the body. O. Sheppard has told McKinnley Grimfs, a friend, that in the past he was taken woman friends to his cellar at 42 Deckard St. for social purposes, and has worked on the cellar to make it comfortable.

3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described — has been stolen — or is being concealed, etc. and may be found in the possession of OSBORNE SHEPPARD at premises 2nd floor at 42 Deckard St. Roxbury

4. The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible). A fifth bottle of Ameretto Liquor, 2 nickle bags of marijuana, a womans jacket that has been described as black-grey (charcoal) possessions of Sandra D. Boulware, similar type wire and rope that match on the body of Sandra D. Boulware, or in the above thunderbird. Blunt instrument that might have been used on the victim. Mens or Womans clothing that may have blood, gasoline, burns on them. Items that may have fingerprints of the victim.

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the person or persons to be searched) The second floor at 42 Deckard St. Rox. and that part of the cellar controlled by Osborne Sheppard. 42 Deckard St. is a three story red brick apartment building with a basement that is attached to yellow & similalr structures on both sides. and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

/s/_____

Peter J. O'Malley

Signature of Applicant

Then personally appeared the above named Peter J. O'Malley and made oath that the foregoing affidavit by him subscribed is true.

Before me: clerk: /s/ Josepth F. Feeney

Mass. Trial Court

SUFFOLK, ss. City of Boston, May 6 1979.

By virtue of the within warrant I have this day entered and searched the within-described premises, and then and there found and seized 1 navy blue mens jacket, 1 pr. mens black boots * 1 patch of hair * 1 piece of tile * 1 pr. mens jockey shorts * styrofoam cup * 1 piece of dirty cloth * 1 pr womans blk leotards * 1 piece insulated wire * 2 womans ear rings * odd pieces of cement with brn stains * piece of paneling * pieces of paper with red stains * pieces of 3 different kinds of wire * a womans white right shoe * piece of rug * 1 book with tel. numbers * 1 multi color throw cloth * 1 bed sheet * 5 ash trays * 1 brandy glass * 1 telephone and all of said items are now before said Court to be dealt with according to law.

/s/ Lewis McCoulsey Police Officer.

197 No. 96

Roxbury Division
DORCHESTER DISTRICT (crossed out)
Mass. Trial Court.

COMMONWEALTH
on complaint of

SEARCH WARRANT.
Controlled Substance (Xed out)
G.L.C. 276 Sec. 2 thru 3A

To the Justices of the Municipal Court of the Roxbury District, holden in said Dorchester District for the transaction of criminal business within the County of Suffolk:

of Boston

in the County of Suffolk, Police Officer, on oath informs the said Court, that he has reason to believe that any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, is kept or deposited by OSBORNE SHEPPARD *some person or persons unknown to the said* _____ in certain rooms in the 2nd & basement story of the building situated and numbered 42 in Deckard St., street in said city and within the judicial district of said Court and prays a Warrant to search there for the same.

RECEIVED and sworn to before this Court, this 6th day of May in the year of our Lord one thousand nine hundred and seventy Nine.

Clerk.

Commonwealth of Massachusetts

SUFFOLK, TO WIT:

To the Sheriff of our County of Suffolk, his Deputies, and the Constables and Police Officers of the City of Boston in said County: Greeting.

WE COMMAND YOU, and each of you forthwith, with necessary and proper assistants, to enter in the day time or in the night time in the _____ mentioned in the above information, and there diligently to search for any controlled substance, article, implement or other paraphernalia used in,

for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action, and to arrest the person or persons in whose possession it is found, together with all persons present if any of the aforesaid substances is found, and bring them before said Court to be dealt with according to law, and return this warrant with your doings thereon.

You are also commanded, in like manner, to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said substances and persons or either of them.

WITNESS, Joseph F. Feeney, Esquire, at Boston, in said Roxbury Division Mass. Trial Court, this sixth day of May in the year of our Lord one thousand nine hundred and seventy nine.

/s/ Joseph F. Feeney
Trial Justice, Mass. Trial Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 026071

COMMONWEALTH	) MEMORANDUM CONTAINING FIND-
	) INGS OF FACT AND RULINGS OF LAW
VS.	) RE DEFENDANT'S MOTION AND
	) AMENDED MOTION TO SUPPRESS
OSBORNE SHEPPARD	)

. . . . . .

Statement of the Case

The defendant Osborne Sheppard awaits trial upon the above numbered indictment which presents murder in the first degree. Presently, the defendant urges both a Motion to Suppress physical evidence which was filed on February 21, 1980 and an "Amended Motion" seeking suppression of certain oral statements allegedly made by him during a claimed custodial inquiry on May 5, 1979. The grounds advanced for the suppression of the physical evidence are that the items that were seized were taken pursuant to the authority of a search warrant that both as to form and content is so defective as to be a nullity; and, alternatively that an examination of the affidavit supporting its issuance reveals a lack of probable cause. With respect to the arguments advanced for suppression of the oral statements, the grounds relied upon are a failure to comply with the requirement of Miranda in that an alleged custodial interrogation without a prior constitutional advices of rights was had and, in any event, that interrogation was a detention

offensive to the fourth amendment under the rationale of *Dunaway* v. *New York*, ____ U.S. ____ (1979).

Findings of Fact

1. As of May 5, 1979 there had been multiple homicides that had occurred in the Roxbury section of Boston. There had been ten or eleven young black female victims murdered in the span of approximately four months. These incidents were understandably a matter of extreme community interest. The events received considerable newspaper attention and other public coverage. In response to these several concerns, the Boston Police had placed its District 2 detective personnel on double shifts and, or, overtime in an attempt to discover the perpetrators of these crimes and thereby restore peace and order to the community.

2. In the early morning hours of May 5, 1979 (sometime at or about 5 A.M.) the body of the tenth (or eleventh) victim was discovered in a vacant lot within Roxbury. The body had been burned and the responding officers observed a patch of material and a length of wire attached to the leg of the corpse. The Police Commissioner, one Jordan, and the District 2 detectives gathered at the scene before 6 A.M.

3. An intensive police effort commenced. First attempts were made to identify the visibly unrecognizable body. A detective Montgomery began knocking on neighborhood doors to discover whether nearby residents had observed anything. Later, he was furnished with a photograph of a woman who, police thought, might possibly have been the victim. Montgomery started asking questions in various local establishments seeking to find anyone who might recognize the woman in the photograph. While making this routine inquiry within a bar, a patron approached and related that the woman depicted was acquainted with his girlfriend. After being unable to

reach this person on the telephone, Montgomery went to the address furnished by the patron only to learn that other police had already contacted her and that she was then at the police station.

4. At some time around midday, Sgt. Albert Bornstein, Chief of District 2 detectives summonsed all teams working on the homicide to a briefing session. Bornstein informed the collected detectives that the victim was thought to be a Sandra Boulware, that a positive identification of the body had been obtained, and, among other things, that Bornstein wanted to interview one "Jimmy Sheppard" who might have been a boyfriend of the deceased. Montgomery knew Sheppard from prior contacts with him. He knew him as a gambler, a so-called "gaming man". Montgomery and his partner cruised the neighborhood, looking for a red and black automobile which Montgomery thought was owned by Sheppard. He looked around the general area of several locations where he thought he might find him (even passing by 158 Whitfield Street). At approximately 5 or 6 P.M. he decided to enter the Whitfield Street premises notwithstanding the fact that there was no red and black car to be seen in the area.

5. Montgomery, accompanied by his partner Brad Jones, knocked on the door which was opened by the defendant. Montgomery spoke first. "Jimmie, you're just the fellow I am looking for", to which Sheppard responded either "Well, you're looking at me" or "Are you looking for me?" Montgomery then gave him the reason. Sgt. Bornstein wanted to ask him, Sheppard, some questions and requested he come to the station. The defendant replied, "Let me get my coat". He went from the first floor to the second. Montgomery also went upstairs. The card players were gathering there. Montgomery moved to relieve any anxiety and told them that his visit wasn't a gaming raid and that he wasn't interested in them. Sheppard had retrieved his coat by this time and the two left.

When they got outside Montgomery did not (contrary to the defendant's contention) handcuff him or ride with him in the back seat. Montgomery who rode in the front passenger seat took out his Miranda card and read it to Sheppard who was seated alone in the back of the unmarked automobile.

6. I find that at this time Sheppard was well aware of his constitutional rights. He was fifty-five years of age. He had considerable prior experience with police officers and police investigations. On May 5, 1979, prior to Montgomery's recital, Sheppard well knew he had a constitutional right to remain silent, that anything he said could be used against him, that he had a right to a lawyer, and that if arrested he had a right to use the telephone. He was alert and not under the influence of any narcotic or alcohol. Perhaps it should be noted he was about to act as a dealer in a card game with "gaming men" hardly a casual activity where mental dullness or lack of alertness is long tolerated. Montgomery commenced to ask Sheppard about his whereabouts on the morning of May 5, 1979. Sheppard who has described himself as rather "well read and well versed" and certainly who is intelligent and articulate, asked what it was all about. Montgomery replied, "Do you know Sandra Boulware" to which Sheppard affirmatively responded. Montgomery stated, "She is no longer with us".

Montgomery inquired at considerable length of Sheppard, all as more fully appears from Exhibits 16 and 17, while traveling from Whitfield Street to the police station. This court finds that Sheppard was well aware of the extent and scope of his rights and having just been re-informed by Montgomery decided to respond and answer questions. He knew that the police were investigating the death of Sandra Boulware and were interested in exploring his relationship with her and in determining his whereabouts and activities at least on May 4 and May 5, 1979. He had been arrested on previous

occasions. He knew that he was not in custody. He fully understood each, every and all options open to him. His will had not been overborne. He made a rational, strategic decision. He had not been intimidated, and his waiver was voluntary.

7. When Sheppard arrived at the station, Montgomery brought him to Bornstein's office and introduced them. Bornstein told him he was investigating the homicide of Sandra Boulware and wanted to interview him. Sheppard agreed. He noticed that Bornstein had an additional black police officer come into the room. Sheppard thought that Bornstein was "diplomatic" to do so since it meant that three black and three white officers were then present. Bornstein asked if he could interview Sheppard on tape. Sheppard agreed. Since Bornstein's investigation had not focused upon Sheppard and since he considered Sheppard's visit to be voluntary, he did not repeat the Miranda warnings given earlier by Montgomery.

On the tape Sheppard has a deep, rich baritone voice that presents some audible amplification difficulties. However, his voice and vocal demeanor are cool, reflective and calm. His answers were coherent and directly responsive to the questions as posed. Sometimes his answers were cryptic, but often, after a reflective pause, he voluntarily enlarged upon the same. Sometimes he made unsolicited observations. The tape is without a trace of confusion, intimidation, anxiety or uncertainty. On the contrary the vocal impression gleaned from the tape is that of a speaker in full, firm, patient and collected demeanor and in an easy fluid manner making clear and lucid responses to the inquiries put. Sheppard knew that he had a right to decline to be interviewed. He also knew that any answer given could later be used against him. He well knew he could secure the service of a lawyer prior to any questioning. He had past familiarity with arrest and booking procedures. Notwithstanding his presence within a police station, he was under no coercive, or harassing influence. His

decision was unfettered and free. He decided to be interviewed and on tape. It is apparent from the same tape that he was comfortable and confident with his decision during the recording that followed. He depicted himself as one who knew that he hadn't done anything wrong.

8. When the interview was concluded Bornstein thanked Sheppard for his cooperation and the defendant left. Perhaps it should be noted that the victim had another boyfriend whose possible information was of some initial interest to the investigators.

9. The police continued their investigatory efforts and as a part of that effort, interviewed, among others, Elbert Robinson, Finley Robinson, a cook by the name of Howard Druger, the defendant's brother and sister-in-law, and a Philip Barros. The information solicited contradicted in many particulars the information furnished earlier by Sheppard. The investigation quickly began to focus upon the defendant.

10. The police had secured information that Sheppard had borrowed an automobile, a black "T-Bird" of an unknown year from Barros and was in possession of it between 3:00 A.M. and 5:00 A.M. on May 5, 1979. When the police found Barros, they asked him to inspect the vehicle. Stains were observed. A chemist, called for the purpose, determined these stains were human blood stains. These were found both upon the rear bumper and within the trunk compartment. Also found within the trunk were certain strands of wire. Barros told Detective Peter J. O'Malley that when he last used the car on Friday night he had placed a box of apples in the trunk and that there no stains in the trunk or on the bumper at that time. This was shortly before he let Jimmy Sheppard use the car. The car inspection and the interview with Barros took place sometime on Sunday morning.

11. Therefore, at about noontime on Sunday, May 6, 1979 Detective O'Malley drafted the affidavit that is now Exhibit

No. 2 herein. The affidavit was intended to support his subsequent application for a search warrant so as to permit the inspection of the premises occupied by Osborne Sheppard, upon the second floor of 42 Deckard Street, Roxbury, where the defendant lived with his mother and sister, and that portion of the cellar which the defendant controlled or utilized in connection with a playroom or recreation room, in which, upon information furnished, the police believed that from time to time he entertained "women friends . . . for social purposes . . .". When he had completed the affidavit, Detective O'Malley showed it to the first assistant District Attorney for Suffolk County and asked him to advise him as to its sufficiency. He was advised the affidavit set forth probable cause to support the issuance of a search warrant.

12. Because it was Sunday, there was neither immediate nor ready access to the courts. Although the District 2 Police Station is in close proximity to the Roxbury District Court, Detective O'Malley was informed that four attempts to contact either the clerk or assistant clerks were unsuccessful. In any event, Detective O'Malley and others searched the station and attempted to find a suitable form of search warrant. Finally, from somewhere, they secured a form previously in use at "Dorchester District" entitled "Search Warrant", subtitled "Controlled Substance G.L. c. 276 §§ 1 through 3A." This search warrant, as subsequently issued, appears as Exhibit 1 herein.

Detective O'Malley was aware that the form of warrant found related to searches for controlled substances and needed to be adapted for his intended use. Therefore, he deleted the subtitle "controlled substance" with a typewriter.

13. Meanwhile, arrangements had been made so Detective O'Malley might present his affidavit before a justice whose residence was in nearby West Roxbury. This judge had consented to affording the police an opportunity to be heard im-

mediately at his home. Detective O'Malley therefore made certain typed changes in the warrant form, as seen upon Exhibit 1. In that portion which comprises the complaint, he substituted "Roxbury" for the printed "Dorchester", and further typed in the name of "Osborne Sheppard" where a blank space was afforded for use in identifying the "keeper" or "depositor" of the controlled substance that the form as printed contemplated. Further, the detective typed in "2nd & basement" in a blank space provided for place; sought to be searched; also "42 Deckard St." in the blank space provided for a specification of the premises.

14. This court finds that the police had a legitimate reason and need for proceeding with all due dispatch. The defendant, who was at liberty, customarily arose at midday. He spent his later afternoons and early evenings in the company of gaming men; and, indeed, with some of the persons whom the police had questioned after his recorded interview. It was probable that the defendant would, within hours, learn of the police discoveries, including their observations of the vehicle. Since the items the police sought, as set forth in O'Malley's affidavit, were all small, light, susceptible of easy destruction or quickly transportable, and, if they existed, were in an area in which the defendant had instant and private access, it was reasonable to anticipate an attempt to rid or remove any telltale articles. It was because of this urgency that the police were moving with dispatch.

15. Detective O'Malley arrived at the issuing magistrate's home on Sunday afternoon. He presented his affidavit and made oath as to its contents and signed it before that judicial officer. The Justice acknowledged the same and signed his name, all as presently appears on Exhibit No. 2. I find as a fact that the Justice concluded upon the affidavit that there was probable cause to order the search of the second floor premises occupied by Sheppard and that part of the cellar used

either as a playroom or which was controlled by him. I further find that the Judge stated he would authorize the search as requested. Detective O'Malley offered the form and stated that he knew the form as presented dealt with controlled substances. He showed the Judge where he had crossed out the subtitles. He asked the Judge if this form of the warrant could be adapted so as to provide authorization for the search requested. I find that the Judge stated to Detective O'Malley that he would make the necessary changes so as to provide a suitable form of search warrant. Whereupon, on the back of the warrant the Judge crossed out with a pen "Dorchester District" and wrote in "Roxbury Division, Mass. Trial Court". With respect to the command of the warrant, the judge crossed out with pen the name of the judge and judicial district as it appeared in print and substituted thereof his own name and "Mass. Trial Court, Roxbury Division" in his own handwriting. Thereafter, he dated the warrant, signed it and delivered it to Detective O'Malley. Also, he gave the affidavit back to Detective O'Malley without making in the warrant any other alterations or additions. I find, as a fact, as a reasonable inference that may be drawn from the evidence presented, that the issuing magistrate considered that portion of the form furnished which appears immediately above the command of the warrant and which was a form provided for a clerk's attestation of the fact a complaint had been made, as an integral part of the process he was then issuing. He informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested.[1] Detective O'Malley then left the magistrate's home.

16. Thereafter, the search warrant was executed by a group of officers under the direction of Detective O'Malley.

---

[1] Detective O'Malley also sought and secured an arrest warrant after he had been examined under oath by the same magistrate. No issue regarding the arrest warrant has been raised.

Sheppard was not home. The premises of the second floor apartment which was occupied by the defendant and the playroom in the cellar were searched. The search was had and accomplished within the limits that Detective O'Malley understood the warrant to permit. I find that O'Malley had the affidavit as well as the search warrant with him. The warrant was peacefully executed. The defendant's mother and sister were present at the time. O'Malley orally informed them of the fact that he had a warrant authorizing the search of the second floor premises and cellar area occupied by the defendant. There was no evidence that either occupant asked to see it or that it was read spontaneously to them.

17. Sheppard's bedroom was searched and certain items seized. When police entered into the cellar playroom area, they observed an open door leading into an adjacent unfinished area. The door was open. The door frame had a device which permitted it to be secured from within the playroom. There was no evidence of any other means of access to that area other than through the playroom. The police entered and searched the playroom. At or near the open door was a scatter rug containing blood stains. At or near the door opening were pieces of cement showing apparent blood stains. In the unfinished area most proximate to the door police observed women's earrings. Other articles, such as articles of clothing and wire, were found in a depression in this cellar area. I find this cellar area to be an area under the control of Sheppard. It was about fifteen feet from the door. I find that the search was within the limits that O'Malley understood the warrant to permit.

18. After the search was accomplished, O'Malley and one McConkey inventoried the items seized. (One of the items inventoried was a bed sheet which was removed from a trash barrel found outside the dwelling.) O'Malley made his return to the Roxbury Court on Monday morning.

Rulings of Law

With respect to the tangible articles seized by the police on May 6, 1979 from the second floor bedroom of Osborne Sheppard and the cellar area, there are two contentions advanced.

The initial contention considered is that the affidavit fails to establish probable cause. This argument is without merit. First, the law is settled that the affidavit shall be read in a commonsense fashion and precision of language is not required. *United States* v. *Ventresca*, 380 U.S. 102, 108-109 (1965). Massachusetts has followed the federal lead holding that the contents will not be first dissected so that each resulting fragment shall be subjected to a hypertechnical test of its sufficiency standing alone. *Commonwealth* v. *Steward*, 358 Mass. 747, 751. Nor should the affidavit be reviewed from the point of view of a common law pleader. *Commonwealth* v. *Pellier*, 362 Mass. 621 (1972). Indeed, if police are to be encouraged, it seems good policy to allow a certain leeway or leniency in the after-the-fact review of the application's sufficiency. *Commonwealth* v. *Corradino*, 368 Mass. 411, 416 (1975).

Of course, the same Fourth Amendment standard of probable cause is applicable to a search as it applies to arrest and this standard was acknowledged in *Commonwealth* v. *Stevens*, 362 Mass. 24 (1972) and restated in *Commonwealth* v. *Tarver*, 369 Mass. 302 (1975) and most recently in *Commonwealth* v. *Cefalo*, Mass. Adv. Sh. (1980) 1875, 1885-1886.

Probable cause must be shown within the affidavit without resort to extraneous evidence. By way of definition, probable cause exists wherever the facts and circumstances within the knowledge of the government and of which it had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S.

182 (1925), *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). Massachusetts has used the phrase "prudent man" when discussing the sufficiency of the knowledge necessary. *Commonwealth* v. *Miller*, 366 Mass. 387 (1974). Also, the issuing judge has a right to draw inferences from the affidavit. *Commonwealth* v. *Moran*, 353 Mass. 166, 170.

Suffice to say that a review of the affidavit at issue showed that ample facts were averred which would support a reasonable belief in a prudent man that this defendant had committed murder. He was the last person who was known to have been in the company of the victim. The contact was within five days of the discovery of the victim. The place was in Roxbury which was where the body was found. The defendant operated a borrowed vehicle in Roxbury at a time just before the body was discovered. Upon visual inspection within a day and one-half of the discovery of the body, blood stains were found upon that car and those stains were not present immediately before the defendant borrowed the car. Also, the inspection revealed rope and wire in the car and the deceased was found with wire wrapped about her person. In sum, the averments are sufficient to permit a man of reasonable caution to believe that it was probable that the crime of murder had been committed and that there was probable cause to believe this defendant to be the perpetrator.

The next issue is the validity of the warrant. The Commonwealth seeks to justify the search as one which was effected by a warrant valid on its face.

The language of the Fourth Amendment is clear and requires that "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Article XIV of the Declaration of Rights to the Massachusetts Constitution requires that the warrant contain ". . . a special designation of the persons or objects of search arrest or seizure . . . with the formalities prescribed by the

laws." Therefore, as has been often said, "nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U.S. 191, 196; see also *Commonwealth* v. *Wojcik*, 358 Mass. 623, 625 (1971).

A search warrant which described the property in greater detail than the affidavit has been upheld. *Commonwealth* v. *Cuddy*, 353 Mass. 305, 309 (1967). A search warrant may be read with the complaint where it is attached to the warrant to provide sufficiency of description of the place to be searched. *Commonwealth* v. *Pope*, 354 Mass. 625, 629 (1968). Further, there are circumstances where it is permissive that the affidavit and warrant may be read together. In *Commonwealth* v. *Todesco*, 363 Mass. 445 (1973), the affidavit was attached to the warrant and the warrant made specific reference to the affidavit. It was held the requirement of specificity could be met by a reading of both. A wiretap warrant whichomitted the fifteen-day limit was considered valid since the warrant could be read in conjunction with the application which sought the fifteen-day authority. *Commonwealth* v. *Vitello*, 367 Mass. 224, 271-272 (1975). In that case it was thought significant that the police officer who made the affidavit was involved in the execution of the warrant. This was because he could be deemed to be aware of the limitations on the warrant. Moreover, an inadequate or ambiguous warrant description has been deemed sufficient by a reading of the affidavit and by the fact of "the knowledge of the officers on the scene". *Commonwealth* v. *Rugaber*, 369 Mass. 765, 769 (1976). It has most recently been suggested that the affidavit may be read along with the warrant to establish sufficiency of description even without physical attachment but where there was accompaniment. *Commonwealth* v. *Taylor*, Mass. App. Ct. Adv. Sh. (1980) 1653, 1657.

The argument of the Commonwealth fails to be persuasive. There are similarities between the case at bar and *Common-*

wealth v. *Vitello, supra*, in that the omissions from the wiretap were found by the trial judge to be as a result of "error and inadvertence" just as this court has found the omissions in the warrant to be inadvertent and in error. Likewise the officer executing the warrant in this case was the affiant and he possessed the unattached but accompanying affidavit. The reason the government's contention fails is that in every case in which a document has been utilized for the purposes of providing the requisite particularity, the basis has been that the warrant has used some suitable terms of reference which have supported the incorporation of the document. This has been plainly stated in the federal circuit which includes Massachusetts. *Application of Lafayette Academy, Inc.*, 610 F.2d 1 (1st Cir. 1979); *United States* v. *Klein*, 565 F.2d 183 (1st Cir. 1977). Furthermore, although not necessary to the holding, this principle has been approvingly articulated in *Commonwealth* v. *Accaputo*, Mass. Adv. Sh. (1980) 1009, 1019.

Therefore, the warrant at issue is fatally defective. The remaining issue becomes whether or not given the circumstances of this case the exclusionary rule should not be applied.

An examination of this judicial creation may be helpful. In contrast to the Fifth Amendment's direct command against the admission of compelled testimony the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation. Until 1914 there was no barrier to the introduction in criminal trials of evidence obtained in violation of the Amendment. *Adams* v. *New York* 192 U.S. 585 (1904), *Commonwealth* v. *Dana* 2 Metcalf 329, 337 (1841). In *Weeks* v. *United States* 232 05383 (1914) it was held that the Fourth Amendment alone may be a basis of excluding evidence at a federal criminal trial of evidence illegally seized by a federal officer. The *Weeks* holding, however, did not apply to state officers and material unconstitutionally seized by a state officer could be admitted

in a federal criminal proceeding. This became known as the "silver platter" doctrine. *Lustig* v. *United States*, 338 U.S. 74, 78-79 (1949). Thirty-five years after *Weeks*, the right to be free from arbitrary intrusion that is protected by the Fourth Amendment is "implicit in the concept of ordered liberty and as such enforceable against the states through the [Fourteenth Amendment] "Due Process Clause." *Wolf* v. *Colorado* 338 US 25, 27-28 (1949). The *Wolf* court however did not impose the *Weeks* exclusionary rule upon the states "as an essential ingredient of that right." See *Wolf supra* at 29. The test became whether the means used by a state were sufficiently offensive to the concept of ordered liberty as to make the admission of the evidence a violation of the Due Process Clause. *Rochin* v. *California* 342 US 165 (1952), *Irvine* v. *California* 347 US 128 (1954).

Thus as matters stood throughout most of the nineteen-fifties, the Fourth Amendment was applicable to the states, but a state could allow an official to engage in a violation thereof and, except in the most extreme case, avoid judicial sanction. To compound the problem, federal authorities, if they happened upon a state so inclined could profit from the state's action by receiving the unconstitutionally obtained evidence on the silver platter. Therefore, in retrospect, it was not surprising that in 1960 the Supreme Court exercised its "supervisory power over the administration of criminal justice in the federal courts" and barred from federal trials evidence improperly seized by state officers. *Elkins* v. *United States* 364 US 206, 216 (1960).

One year later the exclusionary rule was made applicable to state criminal trials *Mapp* v. *Ohio* 367 US 643, 655 (1961). The *Mapp* majority justified the application of the rule to the states on several grounds (i.e. prevention of introduction of evidence where the introduction is tantamount to a coerced confession; deterrence of Fourth Amendment violations; preservation of

judicial integrity) but principally upon the proposition that exclusion would deter future unlawful police conduct.

The debate within the Court upon the exclusionary rule has been considerable. However, it is clear and plain that the contention that the exclusionary rule is somehow coextensive with the Fourth Amendment is simply inaccurate and false.

> "In sum the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect rather than a personal constitutional right of the party aggrieved".
> *United States* v. *Calandra* 414 US 338, 348 (1974).

Because the exclusionary rule is "strong medicine" care should be had in prescribing it for all ills and the majority of the Supreme Court has exercised caution. Early on, the Court developed standing requirements in a balancing process between two competing social concerns, "the interest that the public has in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth", *Alderman* v. *United States* 394 US 165, 174-175 (1969) as against the particular individual's right not to be the subject of an arbitrary intrusion upon his person or private effects, *Brown* v. *United States*, 411 US 223 (1973). To state it another way, in deciding whether or not the exclusionary rule shall be applied, one first must recognize that the policies behind the rule are not absolute but relative. There is a balancing to be had between the strong public interest in truth at trial on the one hand, and an incremental contribution to the protection of Fourth Amendment or Fifth Amendment values. Therefore, although there is some dispute among the individual judges as to where the line should be drawn, the great majority of the Justices employ this reasoning

or balancing procedure and the results are easily understandable even if disputed. Cases clearly illustrate this process. *Harris* v. *New York* 401 US 222 (1971); *United States* v. *Calandra* 414 U.S. 338 (1974); *Michigan* v. *Tucker* 417 US 433 (1974); *United States* v. *Peltier* 422 US 531 (1975); *United States* v. *Jones* 428 US 433 (1976); *Stone* v. *Powell* 428 US 465 (1976); *United States* v. *Ceccelini* 435 US 268 (1978); *Rakas* v. *Illinois* 439 U.S. 128 (1978); *United States* v. *Caceres* 440 US 741 (1979); *Michigan* v. *DiFillipo* 443 US 31 (1979), and, *Yberra* v. *Illinois* ____ U.S. ____ (1979).

The nineteen-seventies has been a time wherein the Supreme Court has been establishing the parameters of the exclusionary rule which it judicially earlier fashioned and made applicable to the states in the nineteen-sixties.

In this case the police sought a warrant. The affidavit was submitted to an official from the District Attorney's office for a determination as to its adequacy from the point of view of probable cause. There was proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search. The police had adequately described with constitutional specificity the places to be searched and the items to be seized. The police presented a form which was the only form of warrant available to them. The magistrate said he could adopt it. Thereafter the actual search undertaken was within the limits of the authority the police thought reasonably had been granted.

The Commonwealth in this case places great emphasis on *United States* v. *Williams* ____ F2 ____ (5th Cir. 1980) in which there appears a well reasoned justification for a good faith exception to the application of the exclusionary rule. The case is persuasive. However, of even greater weight is *Commonwealth* v. *Rugaber* 369 Mass. 765 (1976). In a situation where law enforcement officials acted mistakenly but upon

probable cause and in good faith and which presented a factual situation in which exclusion would have no deterrent effect stated:

> In these circumstances we agree with the judge who ruled that even if the warrant was defective, the exclusionary rule should not be applied since it could have no deterrent effect.
> *Commonwealth* v. *Rugaber, supra* at 769.

Likewise in this case, if police officers undertake their duties properly, they will act in the same fashion in similar circumstances in the future and the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function.

Therefore, the evidence seized in this case is admissive notwithstanding any defect in the warrant.

Based upon the facts found above, this court now rules that the statements made on May 5, 1979 at the District 2 Police Station were freely and voluntarily made.

Miranda warnings must precede police questioning whenever that person is "deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). Suffice to say this court has found as a fact that the defendant was afforded his Miranda warnings by Montgomery before any police interrogation was had.

Therefore the issue is whether or not there was a knowledgeable waiver.

In reference to Miranda issues, trial courts must indulge every reasonable presumption against waiver of fundamental constitutional rights. *Johnson* v. *Zerbst*, 304 U.S. 458, 464. The determination of whether there has been an intelligent waiver depends in each case upon the particular circumstances

and facts of the matter, including the background, experience and conduct of the defendant. The Commonwealth has a "very special and heavy burden" of showing the defendant knowingly and intelligently waived his right to silence and counsel. *Commonwealth* v. *Cain*, 361 Mass. 224 (1972). Station house inquiry, since it is generally most conducive to successful inquiry, is particularly scrutinized. *Commonwealth* v. *Hass*, 373 Mass. 545 (1977).

In reference to voluntariness, certain facts are obvious. The defendant was talkative from the outset. He was not misled. The questioning was not unduly long and he was not subjected to lengthy inquiry. He did not seek access to any friend, family or counsel. He did not indicate any physical or mental ailment. Sheppard was fifty-five years of age and had prior experience with police practices sufficient to understand his position. He was not overawed. He was not intimidated. The essence of the ability to make a voluntary statement is the ability to make a free choice. In short, the statement must be the product of a free will. *Eisen* v. *Picard*, 452 F.2d 860. Sheppard's self-preservation mechanism was operative. *Pia* v. *United States*, 397 F.2d 627, 634. This court finds that the statements made were the product of a rational intellect. Sheppard made the election to talk rather than exercise his right to silence. It was a strategic decision to present himself as a man with nothing to hide.

Many of the cases upon which this court relies were recently collected in *Commonwealth* v. *Mahnke*, 368 Mass. 662, 699-700 (1975) and there is no reason to set them forth herein.

This court concludes the statements made on May 5, 1979 by the defendant were made after a knowing and voluntary waiver of his Miranda rights.

Conclusion

The Motion to Suppress and the Amended Motion to Suppress are to be endorsed as follows: "The within motion be and hereby is denied for reason of findings made and rulings set forth in a memorandum of this date filed herewith."

/ s / _____
John T. Ronan
Justice of the Superior Court

September 26, 1980

1982

3-8	Cassette and Transcript of statement by defendant to Police.
4-9	Waiver of 120-Day Rule. Notice to counsel.
7-1	Letter to Mr. Sheppard, acknowledging his of June 29th concerning opinion from SJC.
10-26	The judgment is reversed and the verdict is set aside. Rescript October 26, 1982 Reasons as on file. Notice to counsel.
11-3	Motion of Commonwealth to stay issuance of rescript. ALLOWED by the Court 11-22-82.
12-17	Notice received from the Supreme Court of the United States of the filing of Petition for Certiorari (82-963) on 12/8/82.

COMMONWEALTH vs. OSBORNE SHEPPARD.

Suffolk. December 8, 1981. — October 26, 1982.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, LYNCH, & O'CONNOR, JJ.

Search and Seizure. Evidence, Admissions and confessions. *Constitutional Law,* Search and seizure, Admissions and confessions.

At a criminal trial no error appeared in the denial of the defendant's motion to suppress statements made by him during a noncustodial interview at a police station, at a time when the police investigation had not yet focused on the defendant. [ ]

The exclusionary rule as enunciated by the Supreme Court of the United States required suppression of incriminating evidence obtained in the course of a police search conducted in good faith and pursuant to a warrant which had been issued on probable cause but which, as the result of negligence by the issuing magistrate, violated the constitutional and statutory requirement that search warrants describe the articles to be seized, and where the affidavit which had been presented to the magistrate, and which did describe the objects of the search, was neither attached to the warrant nor referred to therein. [ ] LIACOS and ABRAMS, JJ., concurring. LYNCH, J., dissenting.

INDICTMENT found and returned in the Superior Court Department on May 14, 1979.

Pretrial motions to suppress evidence were heard by *Ronan,* J., and the case was tried before him.

John F. Herlihy, Jr., for the defendant.

Newman A. Flanagan, District Attorney (*Clyde R. W. Garrigan,* Assistant District Attorney, with him) for the Commonwealth.

WILKINS, J. In this appeal from a conviction of murder in the first degree, we are faced with the serious and challenging question whether the exclusionary rule, adopted by the Supreme Court of the United States to protect Fourth Amendment rights, requires the suppression of incriminating evidence obtained in the course of a police search con-

ducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statutory requirement that search warrants describe the things to be seized. See Fourth Amendment to the Constitution of the United States;[1] art. 14 of the Declaration of Rights of the Constitution of the Commonwealth;[2] and G. L. c. 276, § 2.[3] We conclude that, solely on the basis of the opinions of the Supreme Court of the United States, the exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant. We reject the defendant's other, considerably less substantial challenges to his conviction.

The badly burned body of Sandra D. Boulware, a twenty-nine year old black woman, was found in a vacant lot in the Roxbury section of Boston at approximately 5 A.M. on Saturday, May 5, 1979. Pieces of wire were found on the body and in the vicinity of the body. An autopsy, conducted about 8 A.M. that day, disclosed that the victim had died of multiple compound comminuted skull fractures, caused by at least four blows inflicted within a day of the autopsy. There was medical testimony that the victim was alive, but unconscious, at the time her body was set on fire, but that she succumbed to the blows inflicted on her and not as a result of the burning of her body.

---

[1] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] Article 14 provides, in part, that "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of . . . all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant . . . to make search in suspected places . . . or to seize . . . property, be not accompanied with a special designation of the . . . objects of search . . . or seizure."

[3] General Laws c. 276, § 2, as appearing in St. 1964, c. 557, § 2, provides in part that "[s]earch warrants . . . shall particularly describe the property or articles to be searched for." They must be substantially in the form prescribed in G. L. c. 276, § 2A.

The victim's sister had reported her missing on May 4, and said that she had last seen her on May 1. She identified the body at the morgue. The police learned that the victim had two boyfriends, "Rudy" and "Jimmy." The defendant was known as "Jimmy." The police interviewed "Rudy" on Saturday afternoon, May 5. They also undertook to locate the defendant. Two police officers who knew the defendant went looking for him. They eventually went to a house in Dorchester known as a "gaming house," because card games were regularly played there. After they rang the doorbell, the defendant answered the door. The police told him that "the Sergeant" wanted to talk to him at the police station. The defendant said, "Let me get my coat." He went upstairs, accompanied by one of the police officers, and obtained his coat. The defendant, who was not handcuffed, rode to the police station in the back seat of an unmarked police cruiser; the two policemen were in the front seat. The defendant had had experience with police investigations; he had been arrested previously; and he knew he was not in custody. One of the policemen gave the defendant Miranda warnings. In answer to questions in the cruiser, the defendant said he had last seen the victim on Tuesday (May 1). He had gone to her house, stayed there for about an hour, and left with her in a taxicab. They stopped to purchase some marihuana and a bottle of amaretto. The victim left him, he said, at 1 P.M. and he had not seen her since. One of the policemen told the defendant that Sandra Boulware was "no longer with us."

At the District 2 police station, Sergeant Bornstein interviewed the defendant in the presence of several other officers. The interview, which lasted about an hour, was recorded on tape.[4] The defendant substantially repeated what he had said in the police cruiser on the way to the police station and added that on Tuesday, after purchasing

[4]The tape was introduced as an exhibit and was heard by the judge during the hearing on the defendant's motion to suppress. At the trial, the tape was introduced as an exhibit and heard by the jury.

the marihuana and the amaretto, he and the victim had gone to the defendant's home at 42 Deckard Street in Roxbury where the victim stayed until she left at 2 P.M. to take a cab. The defendant gave an explanation of his whereabouts from Tuesday (when he claimed he last saw the victim) until Saturday (the day of the interview). He said that he had been at the "gaming house" in Dorchester, where the police found him, from 9 P.M. on Friday (May 4) until he left at 5 A.M. on Saturday (May 5) to take a bus home to Deckard Street. The defendant identified various people who were at the "gaming house" that night. At the end of the interview, Sergeant Bornstein thanked the defendant, and the defendant left the station.[5]

The police continued their investigation. They interviewed the men who the defendant had said were at the "gaming house" on Friday night. They learned that at about 3 A.M. on Saturday, the defendant had borrowed the car of one Barros to drive two men home. He dropped them off in a trip that took no more than fifteen minutes. The defendant returned the car to the "gaming house" at about 4:45 A.M. He lay down for only a few minutes, suddenly jumped up, said he had something to do, and left.

The police also learned that at approximately 6 A.M. on Saturday, an occupant of the "gaming house," one "Pee Wee," had left for work. He noticed a pair of black calfskin gloves and a gas can in a corner of the porch, and brought them into the house. The police took possession of these items on Sunday morning.[6]

In the course of their investigation on Sunday morning, the police learned from a friend of the defendant that the

[5] The defendant's motion to suppress evidence included a challenge to the admissibility of his statements to the police in the cruiser and at the District 2 police station.

[6] At the trial, "Pee Wee" testified that on Saturday (May 5) in the afternoon, when he arrived back at the "gaming house," the defendant was there and said, "[O]h Pee Wee, I see that you brought my gloves and gas can in . . . . I appreciate it very much." The police and the prosecution were not aware of this statement until the trial.

basement of the defendant's home at 42 Deckard Street had been refinished and that the defendant had said that he entertained women there. On Sunday morning they also spoke with Barros, the owner of the car the defendant was said to have borrowed early on Saturday morning. Barros corroborated the fact that the defendant had borrowed his car, a 1975 black Thunderbird. Only the defendant had used the car in the interim. The police then inspected the Thunderbird with Barros's consent. They found bloodstains and pieces of hair on its rear bumper and near the lid of the trunk. Barros told the police that there had been no blood in the trunk or along the bumper on Friday night when he had driven the car home. Various samples were taken. Inside the trunk, the police found three types of wire.

Later Sunday morning, the district attorney for the Suffolk district, Sergeant Bornstein, and Detective Peter J. O'Malley met at the District 2 police station to discuss the case. They concluded that they should seek a warrant for the arrest of the defendant and a warrant to search 42 Deckard Street, Roxbury. Detective O'Malley prepared and typed an affidavit in support of an application for a search warrant. The district attorney, his first assistant, and Sergeant Bornstein looked at it and concluded that it set forth probable cause for the arrest and for the search.[7]

[7] The circumstances set forth in the affidavit are as follows: "On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Boulware was found beaten and burned to death opp. 28 Hazelwood St. Rox. in a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation that followed, it was determined that one Osborne Sheppard of 42 Deckard St. Rox. was the last person to have been seen with Sandra. In an interview [he] gave to Sgt. Bornstein, O. Sheppard stated that he and Sandra went to 42 Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickel bags of herb and a fifth of amaretto liquor. Officers in this investigation have established that O. Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found. And that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his [having] taken possession. Also in the trunk of this car were

It is at this point that problems began that led to the issuance of a defective warrant. It was then Sunday afternoon. No clerk or assistant clerk of the Roxbury Division of the District Court Department could be found, nor could a suitable form of search warrant be found at the District 2 police station or at two or three other stations. Detective O'Malley found a warrant form of the Municipal Court of the Dorchester District, once used for searches for controlled substances. He attempted to adapt the printed form. He crossed out the words "controlled substance" on the cover side of the form. On the face side, he replaced the word "Dorchester" with the word "Roxbury." He inserted a reference to "2nd & Basement" of 42 Deckard Street as the place to search. However, the reference to "controlled substance" was not deleted in those portions of the form that constituted the application for a search warrant and would constitute the warrant itself.

Arrangements were made to present the affidavit and applications for a search warrant and an arrest warrant to a judge at his home. Detective O'Malley, Sergeant Bornstein, two homicide detectives, and the first assistant district attorney went to the judge's home, arriving at approximately

found various pieces of wire and rope that may have been used to bind parts of her body. Pieces of wire were found on the body. O. Sheppard has told McKinley Grimes, a friend, that in the past he has taken women friends to his cellar at 42 Deckard St. for social purposes and has worked on the cellar to make it comfortable." (Corrected for punctuation and spelling errors.)

The affidavit described the premises to be searched as the second floor at 42 Deckard Street, Roxbury, and "that part of the cellar controlled by Osborne [Jimmy] Sheppard." It described 42 Deckard Street as a "three story red brick apartment building with a basement."

The affidavit listed the property for which the search was intended as follows: "A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim." (Corrected for punctuation and spelling errors.)

2:45 P.M. The judge took Detective O'Malley's oath and signed the affidavit to that effect. The judge searched his library without success for an appropriate form of search warrant. He then took the "controlled substance" form from Detective O'Malley, made some changes on it, and dated and signed the warrant. The judge made no change in the substantive portion of the printed warrant form which, therefore, contained authority "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance." The warrant made no reference to the items listed in Detective O'Malley's affidavit in support of the application. It neither listed them, nor incorporated them by reference; nor was the affidavit attached to the warrant.[8] The judge gave the search warrant, the affidavit, and the arrest warrant to the police. The defendant raises no challenge to the arrest warrant. Detective O'Malley left the judge's home with the affidavit and had it with him during the search. He thought the search warrant was legal and proper when he left the judge's home. The arrest warrant was executed at the "gaming house," while Detective O'Malley and a team of police personnel went to 42 Deckard Street to search its second floor and basement.

At about 5 P.M. Detective O'Malley and others were admitted to 42 Deckard Street. Detective O'Malley spoke with the defendant's mother and sister, showed them the warrant, and said the police were going to look in the defendant's room and in the cellar for things that were implicated in a homicide. It does not appear that either of the two women read the warrant or asked to have it read.

We summarize the evidence seized at 42 Deckard Street which was introduced at the trial. From the defendant's

[8] We note in passing, although the Commonwealth makes no point of it before us, that the warrant on its face authorized a search for marihuana, that the affidavit referred to marihuana, and that a search for marihuana at 42 Deckard Street was justified by probable cause.

second floor bedroom, the police took apparently blood-stained black boots. In the cellar, part of which was furnished as a playroom, Detective O'Malley found what appeared to be blood stains on the concrete floor and chipped off and took pieces of that concrete. He found two unmatched women's earrings, one apparently with blood-stains, under a piece of plywood which in turn was under a mat in the unfinished portion of the cellar. In the unfinished portion of the cellar, he found an apparently blood-stained envelope, a pair of apparently bloody men's jockey shorts and women's leotards, later determined to be blood-stained. He also found there three types of wire and a woman's hairpiece.

We interrupt the chronology of events to describe evidence introduced at the trial bearing on the significance of these items seized at 42 Deckard Street. A police chemist testified that wire found at the murder scene was similar to wire found in the Thunderbird and in the basement of 42 Deckard Street. He also found a close resemblance between wire of a different type found in the cellar and also in the Thunderbird. A neighborhood friend of the victim identified the bloody earring recovered from the basement as looking like one the victim was wearing about one week before her disappearance. She also identified the leotards as of a type she and the victim had purchased together and the hairpiece as one the victim was wearing the last time she saw the victim alive on Monday, the day before she disappeared. Another witness identified the earring as belonging to the victim.

A special agent of the FBI, assigned to the serology unit of the FBI laboratory in Washington, D.C., testified that blood from the bumper of the Thunderbird was human blood, type O, and contained enzyme groups PGM 2-2 and EAP B-A; that the right black boot found in the defendant's bedroom had human blood on it, type O, with enzymes PGM 2-2 and EAP B-A; that blood found underneath the victim's head at the murder scene was human blood containing enzymes PGM 2-2 and EAP B-A (but he could not

determine the blood grouping); that blood taken from the victim's body by the medical examiner contained enzymes PGM 2-2 and EAP B-A. There was other evidence introduced showing that the victim had blood type O. The concrete chips and the envelope taken from the cellar were found to be stained with type O blood. The FBI expert witness testified further that about 1% of the population would have blood type O and the enzymes PGM 2-2 and EAP B-A.

It can readily be seen that evidence seized in the search of 42 Deckard Street tended to show that the defendant seriously injured the victim in his cellar, hid her earrings under a piece of plywood under a mat, and tied her up with wire available in the cellar of his home. This evidence, much of it obtained as a result of careful and commendable police investigatory techniques, was highly probative of the defendant's guilt. Although the Commonwealth could have presented a case against the defendant without this evidence, this evidence was most important in rounding out a case based only on circumstantial evidence.

An indictment was returned against the defendant on May 14, 1979, charging him with murder, including murder in the first degree, of Sandra D. Boulware. The defendant moved to suppress the statements he made to the police on May 5 and the items seized on May 6 at 42 Deckard Street. He claimed, among other things, that his interrogation on May 5 was a custodial interrogation in violation of his Fourth Amendment rights. In turn, he argued that the search warrant was based on his statements to the police and that the items seized pursuant to the search warrant had to be suppressed as the product of his unconstitutional interrogation. Further, he argued that the items seized at 42 Deckard Street should be suppressed because they were seized pursuant to a defective, unconstitutional search warrant.

A judge of the Superior Court held a three day hearing on the motion to suppress in September, 1980. He made extensive findings of fact and rulings of law. He dealt with certain issues that are not argued on appeal. He concluded

that the defendant freely and voluntarily made statements on May 5 at the District 2 police station after a knowing waiver of his Miranda rights. He concluded that the investigation had not then focused on the defendant. He did not explicitly discuss the defendant's argument that his statements should be suppressed because of his "illegal arrest" or "seizure," but it is apparent from his findings that he regarded the defendant's trip to the police station and his statements made there as voluntary. He, therefore, denied the motion to suppress as it applied to the defendant's statements to the police on May 5.

On the matter of the search warrant, he concluded that the warrant was issued on probable cause. He concluded, however, that the warrant was defective because it failed to list the items to be seized or to incorporate a list of those items by reference. He then considered whether the exclusionary rule as applied to Fourth Amendment violations required suppression of the evidence seized pursuant to the defective warrant. He had found that the police had a legitimate need to proceed with dispatch in obtaining the search warrant. The defendant was at liberty and could reasonably be expected to learn from those questioned at the "gaming house" that the police were investigating him. He found further tfat the judge told Detective O'Malley that he would make the necessary changes in the warrant form so as to provide a suitable form of search warrant and that the warrant as delivered was sufficient authority in form and content to carry out the search as requested. He found also that the search of 42 Deckard Street was carried out within the limits that Detective O'Malley understood the warrant to permit and that Detective O'Malley had the affidavit and search warrant with him at 42 Deckard Street. He concluded that "the actual search undertaken was within the limits of the authority the police thought reasonably had been granted." He denied the defendant's request to suppress the evidence seized at 42 Deckard Street.

The judge concluded that the good faith exception to the exclusionary rule advanced by certain judges in *United*

States v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981), was well reasoned and persuasive. He gave greater weight to the opinion of this court in *Commonwealth* v. *Rugaber*, 369 Mass. 765, 769 (1976), in which we upheld admission of evidence seized pursuant to an assumedly defective search warrant. He regarded the *Rugaber* case as "a situation where law enforcement officials acted mistakenly but upon probable cause and in good faith and which presented a factual situation in which exclusion would have no deterrent effect."[9] He concluded that the police who executed the warrant at Sheppard's dwelling would act similarly in similar situations in the future, and that "the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function." The judge did not cite any case in which the exclusionary rule had been considered in a situation in which error was committed, not by the police or law enforcement officials, but by a judge or issuing magistrate. Neither the *Williams* case nor the *Rugaber* case, relied on by the judge, were opinions of the Supreme Court, which, of course, has the final word on this question.

1. The judge properly denied that portion of the defendant's motion to suppress evidence that was directed toward his statements made to the police on Saturday, May 5. The

[9] In the *Rugaber* case, a search was conducted on probable cause pursuant to a search warrant that properly described the street address of the premises to be searched but contained a physical description of a house next door. *Commonwealth* v. *Rugaber*, 369 Mass. 765, 767 (1976). The warrant was executed at night; officers on the scene directed the executing officers to the proper house; the proper premises were in fact searched; and the officers were unaware of the misdescription when they executed the warrant. *Id.* We regarded the case as a close one. *Id.* at 768. We noted that "[i]nvocations of error and inadvertence cannot ordinarily save an invalid warrant." *Id.* at 767. The police were not reckless but at most negligent in the description. *Id.* In these circumstances, we "agree[d] with the judge, who ruled that even if the warrant was defective, the exclusionary rule should not be applied, since it could have no deterrent effect." *Id.* at 769. The case before us is not, of course, like the *Rugaber* case, one in which the search warrant was ambiguous.

judge found, on ample evidence, that the defendant voluntarily accompanied the police to the station. At the time of the interview, the police investigation had not yet focused on the defendant, and the officers only requested, but did not order, that he accompany them to the station for questioning. He was not handcuffed; he rode alone in the back of the unmarked police cruiser; he knew he was not in custody. When the interview ended, the sergeant thanked him for his cooperation, and he left.

This issue is substantially disposed of by what we said recently in *Commonwealth* v. *Bookman*, 386 Mass. 657, 659-661 (1982). This is not a case like *Dunaway* v. *New York*, 442 U.S. 200 (1979), on which the defendant relies, where there was a custodial interrogation, not supported by probable cause, of a defendant who was involuntarily detained. The circumstances here are like those in *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980), in which the Court held that the defendant's Fourth Amendment rights were not violated when she voluntarily accompanied law enforcement agents to their office for questioning. As in the *Mendenhall* case, the prosecution here met its burden of proving that the interview was not the product of express or implied coercion, but resulted from the defendant's voluntary consent. See, as to the absence of Fourth Amendment violations where persons consent to accompany police officers to station houses for interrogation, *United States* v. *Huberts*, 637 F.2d 630, 635-637 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981); *United States* v. *Williams*, 604 F.2d 1102, 1125-1126 (8th Cir. 1979). See also *Commonwealth* v. *Walden*, Mass. Adv. Sh. (1980) 1309, 1315 (interrogation of a defendant who went voluntarily to the police station).

2. We come then to the question of the admissibility of the evidence seized at 42 Deckard Street purportedly pursuant to the search warrant. We start with our expression of agreement with the judge's conclusion that the warrant was defective. It failed to describe the items sought to be

seized.[10] There is authority upholding a warrant, which does not on its face list any items to be seized, but which incorporates by reference an accompanying or attached description of the items to be seized.[11] The warrant in this case, however, described items (drugs and drug paraphernalia) different from those listed in the affidavit (which related to the murder of Sandra Boulware, but did include marihuana). Moreover, the warrant was not attached to Detective O'Malley's affidavit which listed the items which the judge had found there was probable cause to seize. Most importantly, the warrant did not contain any words which referred to the affidavit. It is true that Detective O'Malley had with him, when he conducted the search, the application for a warrant which listed the items to be seized. We noted in *Commonwealth* v. *Taylor*, Mass. Adv. Sh. (1981) 821, 826-827 n.5, that we were not called on there to decide "whether we would allow a separate document to supply the specificity if, though physically attached to the warrant, it was not referred to therein."[12] Here, however, not only is there a lack of reference, but also the warrant listed a differ-

[10] The Fourth Amendment requires that a search warrant describe the "things to be seized." See *Marron* v. *United States*, 275 U.S. 192, 196 (1927). Article 14 of the Massachusetts Declaration of Rights requires that the warrant be "accompanied with a special designation of the . . . objects" of seizure. The purpose of these limitations is to forbid general warrants (see *Boyd* v. *United States*, 116 U.S. 616, 624-626 [1886]), and in doing so to circumscribe the discretion of the executing officer and to inform the person or persons subject to the seizure what the officer is entitled to take. See *Commonwealth* v. *Accaputo*, Mass. Adv. Sh. (1980) 1009, 1019; *In the Matter of the Application of Lafayette Academy, Inc.*, 610 F.2d 1, 4 (1st Cir. 1979). See also G. L. c. 276, § 2, which requires that the warrant "particularly describe the property or articles to be searched for."

[11] *Commonwealth* v. *Taylor*, Mass. Adv. Sh. (1981) 821, 825-826, and cases cited.

[12] In the *Taylor* case, *supra* at 826-827 n.5, we noted *Castle News Co.* v. *Cahill*, 461 F. Supp. 174, 181 (E.D. Wis. 1978), which sustained a warrant that did not refer to an attached document which provided the requisite specificity. To the same general effect, see *Moore* v. *United States*, 461 F.2d 1236, 1238-1240 (D.C. Cir. 1972). Contra *Brooks* v. *Taylor Tobacco Enters. Inc.*, 260 S.E.2d 419, 422-423 (N.C. 1979).

ent set of items to be seized, and no further description was attached to the warrant. We are not aware of any court that has gone so far as to uphold a general warrant to search particular premises where the searching officer had with him a description of the items to be seized but the warrant made no reference to that description and that description was not attached to the warrant. We thus proceed on the premise that the search warrant in this case violated the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G. L. c. 276, § 2. The question remains whether the defect in the warrant requires the suppression of evidence obtained in the search.

The exclusionary rule is "a judicially created means of effectuating the rights secured by the Fourth Amendment." *Stone* v. *Powell*, 428 U.S. 465, 482 (1976). It is "designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than [as] a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). See *United States* v. *Peltier*, 422 U.S. 531, 538-539 (1975). Moreover, because, under some circumstances, evidence obtained as the result of an unreasonable search or seizure in violation of Fourth Amendment rights is admissible, the exclusionary rule is not coextensive with the prohibitions of the Fourth Amendment.[13]

Furthermore, because evidence obtained in violation of the Fourth Amendment is admissible in particular circumstances, the notion that such evidence must in all instances

[13] Instances in which evidence obtained in violation of the Fourth Amendment is admissible in judicial proceedings include: (a) a case in which no objection is raised to the introduction of such evidence, (b) the use of such evidence in grand jury proceedings (*United States* v. *Calandra*, 414 U.S. 338, 350-352 [1974]), (c) introduction of such evidence for the impeachment of a defendant (*Walder* v. *United States*, 347 U.S. 62 [1954]), (d) circumstances in which the defendant has no standing to challenge the constitutional violation (*Rakas* v. *Illinois*, 439 U.S. 128 [1978]), and (e) the use of evidence seized by one sovereign in civil proceedings brought by another sovereign (*United States* v. *Janis*, 428 U.S. 433, 453-454 [1976]).

be excluded in order to preserve judicial integrity fails as a substantial, independent support for the rule. *Stone* v. *Powell*, *supra* at 485. *Id.* at 499 (Burger, C.J., concurring). See *United States* v. *Janis*, 428 U.S. 433, 458-459 n.35 (1976).[14]

The substantial, and perhaps only, justification for the exclusionary rule relied on by a majority of the Justices of the Supreme Court is the goal of deterring unconstitutional conduct by the police and other law enforcement personnel. See *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Peltier*, 422 U.S. 531, 542 (1975); *United States* v. *Calandra*, 414 U.S. 338, 347 (1974). As we have demonstrated in this opinion, the police conduct in this case was proper. They had probable cause to search the premises, and they prepared an adequate affidavit setting forth that probable cause and submitted it to a judge.[15] The police then received a search warrant that they reasonably believed, on advice from the judge, was adequate to justify a search of the designated premises for the items listed in the application for the warrant.

---

[14] We acknowledge the views of Mr. Justice Brennan that the exclusionary rule enables "the judiciary to avoid the taint of partnership in official lawlessness" and assures the people "that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States* v. *Calandra*, *supra* at 357 (Brennan, J., dissenting). See also *United States* v. *Peltier*, 422 U.S. 531, 551-562 (1975) (Brennan, J., dissenting). There are those critics of the rule who would suggest, however, that exclusion of probative and reliable evidence itself seriously undermines popular trust in government. See references in Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 737-738 (1970), and in Sunderland, Liberals, Conservatives, and the Exclusionary Rule, 71 J. Crim. L. & Criminology 343, 359-360 (1980). See also *Stone* v. *Powell*, 428 U.S. 465, 491 (1976).

[15] This is not, therefore, a case in which the police failed to demonstrate probable cause in the application for the warrant. In such a situation, a magistrate's erroneous conclusion that probable cause was shown could not breathe validity into a warrant. Application of the exclusionary rule would be justified to deter future, inadequate presentations by officer-affiants. See *Franks* v. *Delaware*, 438 U.S. 154, 164-165 (1978); *Aguilar* v. *Texas*, 378 U.S. 108, 114-116 (1964).

The police next conducted a search of Sheppard's dwelling in a manner consistent with their good faith belief that a proper warrant had been issued. They did not exceed the scope of the search that would have been authorized by a warrant in the form that they sought and believed they had. The items that were the subject of the intended search were disclosed on the application for the warrant, which was present at the scene of the search. In short, the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge. The defect in the warrant was not harmful to the defendant in the circumstances of the actual search. The search was conducted in the same way and with the same results as it would have been conducted if the warrant had not been defective.[18]

The question is whether an error of a magistrate, unrelated to police error, calls for the application of the exclusionary rule. It could be argued that the exclusionary rule should apply with particular force to evidence seized pursuant to a search warrant failing to meet Fourth Amendment standards, issued by a judge who should have known, and should have been most sensitive to, the defendant's constitutional rights. If a "criminal is to go free because the constable has blundered" (*People* v. *Defore*, 242 N.Y. 13, 21 [1926] [Cardozo, J.]), perhaps the criminal should go free as well because the magistrate blundered, even though "the suppression of probative but tainted evidence exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case." *United States* v. *Payner*, 447 U.S. 727, 734 (1980). The issue is whether the exclusionary rule should be applied to deny to a jury evidence highly probative of the defendant's guilt of murder because a judge, negligently but

[18] We note that there is no issue in this case as to the reliability of the evidence sought to be excluded. Unlike evidence, such as a confession, obtained in violation of constitutional rights, the physical evidence seized from 42 Deckard Street has not been rendered untrustworthy by the fact that it was seized pursuant to a constitutionally defective warrant. See *Stone* v. *Powell*, 428 U.S. 465, 490 (1976).

in good faith, failed to strike out certain words in the warrant and failed to refer to, or to attach to it, a list of the items to be seized. We are not dealing here with judicial error rising above the level of negligence.[17]

We have found little discussion of the goal of deterrence underlying the exclusionary rule as applied to an error of a judge, except as related to his misconception of the propriety of police conduct.[18] On occasion, the exclusionary rule has been characterized as directed not only toward deterring police misconduct but also "official misconduct" or

[17] We acknowledge that in this case the problem arose on a Sunday in circumstances in which no proper form of warrant was readily available to the judge and there was a need for prompt action. We do not, however, intend to minimize the judge's error. The failure properly to describe in the warrant the items to be seized was a serious omission of constitutional significance.

[18] In *Richmond* v. *Kentucky*, 29 Crim. L. Rep. (BNA) 2529 (Ky. Ct. App. July 31, 1981), the court did not suppress evidence seized in good faith pursuant to a warrant issued on probable cause by a judge who, it was assumed, lacked authority to issue the warrant in the district in which it was issued. There was no showing that the judge acted in bad faith. See *United States* v. *Acosta*, 501 F.2d 1330, 1337 (1974) (Gee, J., dissenting) ("Nor would I expand the [exclusionary] rule to 'deter' magistrates from failing to record matter upon which they rely, conceiving that they will obey the mandates of reviewing magistrates, such as we, when these are understood"), modified, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); *State* v. *Lien*, 265 N.W.2d 833, 840-841 n.1 (Minn. 1978), quoting *State* v. *Nolting*, 312 Minn. 449, 456-457 n.7 (1977) (exclusionary rule is directed at police, not magistrate, misconduct).

For a contrasting view, see *United States* v. *Karathanos*, 531 F.2d 26, 33-34 (2d Cir.) ("[T]he exclusionary rule [ ] [has the] effect of making . . . [magistrates] aware that their decision to issue a search warrant is a matter of importance . . . in regard to the success of any subsequent criminal prosecution. [It] may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires . . . . [Also,] the present universal application of the exclusionary rule . . . gives law enforcement officers no . . . incentive to seek out the most lenient magistrates"), cert. denied, 428 U.S. 910 (1976). See also *Powell* v. *Stone*, 507 F.2d 93, 98 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976), in which the Ninth Circuit Court of Appeals applied the exclusionary rule to evidence seized in good faith pursuant to an unconstitutional substantive statute in order to "deter[ ] legislators from enacting such statutes."

"the Government's unlawful conduct." See *United States* v. *Calandra*, 414 U.S. 338, 348 (1974).[19]

There may be reasonable distinctions between police misconduct and an error of a magistrate such as is involved in this case. Police officers have the objectives of apprehending criminal wrongdoers and of obtaining evidence to convict them. As the Supreme Court has said, they are engaged in the "often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). The exclusionary rule is applied to evidence seized in an unlawful manner by law enforcement officials because it is assumed that such exclusion will "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . '[by] compel[ling] respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.'" *United States* v. *Calandra*, *supra* at 347, quoting from *Elkins* v. *United States*, 364 U.S. 206, 217 (1960). See *Stone* v. *Powell*, 428 U.S. 465, 492 (1976); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

Unlike police officers, magistrates who issue search warrants are required by law to be neutral and detached. According to the Supreme Court, only if the issuing magistrate is detached from the often competitive business of ferreting out crime can a search warrant satisfy the Fourth Amend-

[19]This court has not dealt with the application of the exclusionary rule to deter conduct of judges or magistrates. We have said that "[o]ne branch of the government should not be permitted to use the flagrant wrongdoing of another branch of government to punish a citizen." *Commonwealth* v. *Nine Hundred & Ninety-Two Dollars*, Mass. Adv. Sh. (1981) 1420, 1427. In that case, however, we were dealing with alleged police misconduct. We concluded there that, under art. 14 of the Declaration of Rights, a negligent misrepresentation in an affidavit in support of a search warrant of a fact material or necessary to a finding of probable cause would not alone require the suppression of evidence seized pursuant to such a warrant. *Id.* We noted that where "a police affiant's misstatement is the product of good faith but negligent conduct, the motivation to temper and regulate police behavior is less and the arguments against the government's using the product of that good faith but negligent conduct against a defendant are weakened." *Id.* at 1427-1428.

ment. *Johnson* v. *United States*, *supra*. Here, Sheppard does not claim that the issuing judge joined the police officers in an attempt to investigate Sandra Boulware's homicide, or that the judge was anything but impartial to, and disentangled from, the investigation. Contrast *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326-328 (1979) (town justice acting as a member of a search party under a general warrant).

An issuing magistrate, in contrast to a law enforcement official, should not be involved in searching for evidence, apprehending suspects, and convicting criminals. His job is not a partisan one of ferreting out evidence and seeing it used to prosecute criminals. Instead, he should care foremost about whether he correctly applies the laws of the State and nation, including the Fourth Amendment and art. 14 of the Declaration of Rights. Ideally, he should be indifferent as to whether a particular piece of evidence is admitted at trial or a particular defendant is convicted. The police, in contrast, properly should be partisan, investigatory, and oriented toward discovering and convicting perpetrators of crime.

The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

We recognize that our task is to seek to apply the interpretations of the Constitution of the United States expressed by the Supreme Court of the United States. The usual result in a case where a warrant fails to describe the items to be seized is the suppression of the evidence seized pursuant to that warrant. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 471 (1971). Although there are statements of individual Justices of the Supreme Court critical of the application of the exclusionary rule in particular circumstances,[20] we conclude, on the basis of opinions of the Supreme Court to

[20] See *Stone* v. *Powell*, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring); *id.* at 538-540 (White, J., dissenting); *Bivins* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411-427 (1971) (Burger, C.J., dissenting); *Rakas* v. *Illinois*, 439 U.S. 128, 156 n.5 (1978) (Powell, J., concurring); *Brown* v. *Illinois*, 422 U.S. 590, 611-612 (1975) (Powell, J., concurring); *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974).

These expressions of opinion suggest that, in certain instances at least, a good faith exception to the exclusionary rule might be adopted. Such an exception was recognized as appropriate by a majority of the judges of the Fifth Circuit Court of Appeals in *United States* v. *Williams*, 622 F.2d 830, 840-847 (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981). In a recent opinion, the Court noted, however, that "the State contends that the police conduct here argues for adopting a 'good faith' exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here." *Taylor* v. *Alabama*, 102 S. Ct. 2664, 2669 (1982). That case involved the suppression of a confession made shortly after an illegal arrest unsupported by probable cause.

For a detailed discussion of the appropriateness of a good faith exception, see Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978).

It has also been suggested that the exclusionary rule not apply to serious crimes. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1046-1049 (1974). Professor Kaplan notes certain problems, however, with the adoption of an exception to the exclusionary rule even where the police error is inadvertent and reasonable. *Id.* at 1044-1045. See 1 W. LaFave, Search and Seizure § 1.2 (d), (e), and (f), at 34-39 (1978).

The Model Code of Pre-Arraignment Procedure § SS 290.2 (2) (Proposed Official Draft 1975), suggests that, apart from constitutional mandates, a motion to suppress evidence should be granted only where the asserted violation is substantial. In determining the substantiality of the violation, the Model Code directs courts to consider all the circumstances, including the extent of the deviation from lawful conduct, the extent to

date, that the exclusionary rule requires the suppression of the evidence seized at 42 Deckard Street.[21] Because the exclusionary rule as applied by the Supreme Court in implementing the purposes of the Fourth Amendment requires the suppression of this evidence, we need not consider whether the evidence should be suppressed pursuant to the laws of this Commonwealth. To this date this court has not adopted an exclusionary rule under the law of the Commonwealth to remedy a violation of a criminal defendant's art. 14 rights.[22]

---

which the violation was wilful, the extent to which privacy was invaded, the extent to which exclusion will tend to prevent violations of the law, and the extent to which the violation prejudiced the defendant's ability to defend himself. *Id.* at § SS 290.2 (4).

[21] There is no basis for concluding that this evidence was only cumulative. It was of probative force tending, independently of other evidence, to prove the defendant's guilt. Therefore, its admission cannot be upheld on the ground that such admission was harmless beyond a reasonable doubt.

[22] Before *Mapp* v. *Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the States through the Fourteenth Amendment, illegally seized material could be admitted in evidence in the courts of this Commonwealth. See *Commonwealth* v. *Spofford*, 343 Mass. 703, 706 (1962); *Commonwealth* v. *Wilkins*, 243 Mass. 356, 359 (1923) (art. 14 of the Declaration of Rights does not bar admission of unlawfully seized evidence).

We have noted the possibility of affording more substantive protection to criminal defendants under art. 14 of the Declaration of Rights than under the Fourth Amendment as applied through the Fourteenth Amendment. See *Commonwealth* v. *Podgurski*, 386 Mass. 385, 391 n.11 (1982); *District Attorney for the Plymouth Dist.* v. *New England Tel. & Tel. Co.*, 379 Mass. 586, 589 (1980); *id.* at 597 n.1 (Liacos, J., dissenting); *Commonwealth* v. *Ortiz*, 376 Mass. 349, 358 (1978). We have concluded that, where the police intentionally deprived a defendant of his statutory right to use a telephone (G. L. c. 276, § 33A), "evidence of an in-custody inculpatory statement or corporeal identification, even if accidental, should not be admitted unless the Commonwealth can show beyond a reasonable doubt that the evidence is untainted by the deprivation of the defendant's right." *Commonwealth* v. *Jones*, 362 Mass. 497, 503 (1972). See *Commonwealth* v. *Monosson*, 351 Mass. 327, 329-330 (1966). In *Selectmen of Framingham* v. *Municipal Court of the City of Boston*, 373 Mass. 783, 786-788 (1977), we ruled that, "as matter of Massachusetts law, even though it may not be required by the Federal Constitution," evidence seized from a police officer's home in violation of the Fourth Amendment and art. 14 was not admissible in an administrative hearing to remove the officer.

3. Because they may arise at a retrial of the defendant, we comment on two other issues raised by the defendant. There is no basis for reversal of the conviction on the ground that the judge abused his discretion in denying the defendant's motion that, if he were to testify, the Commonwealth should be barred from using certain prior convictions, pursuant to G. L. c. 233, § 21, for the purpose of impeachment. See *Commonwealth* v. *Diaz*, Mass. Adv. Sh. (1981) 605, 610-612. Nor was there error in denying the defendant's request that he be allowed to make a sworn or an unsworn statement to the jury at the close of the evidence. The matter was within the judge's discretion. *Commonwealth* v. *Rodriquez*, 364 Mass. 87, 95-96 (1973). The defendant has made no showing of an abuse of discretion.

Judgment reversed.
Verdict set aside.

Liacos, J. (concurring, with whom Abrams, J., joins). While I agree with the result reached by the court, I cannot join in that portion of the opinion of the plurality of the court (Part 2) which treats the issue of the admissibility of evidence seized under a warrant admittedly defective.

My disagreement is specifically directed to the grudging acceptance of the exclusionary rule displayed by Justice Wilkins in his discussion of the law and the facts. Cf. *Commonwealth* v. *Loughlin*, 385 Mass. 60, 63 n.3 (1982) ("Doubt about the wisdom of the views of the Supreme Court . . . on the subject of illegal searches and seizures . . . hardly justifies ignoring those views when Fourth Amendment issues are raised in this court"). Moreover, the discussion by the plurality opinion does not accurately reflect either the facts of this case or the relevant legal principles. The plurality initially describes the question involved as one that is both "serious and challenging," because it deals with a "police search conducted in good faith." *Supra* at 488. Further, the plurality describes the issue as "whether an er-

error of a magistrate, unrelated to police error, calls for the application of the exclusionary rule." *Supra* at 503. The plurality then characterizes the error of the magistrate as one that occurred "negligently but in good faith" and as one not "rising above the level of negligence." *Supra* at 503, 504.

It is clear and established law that a warrant, albeit based on probable cause, must specifically describe the premises to be searched and the objects to be seized in order to be a valid basis of a search. *Ybarra* v. *Illinois*, 444 U.S. 85, 92 n.4 (1979). *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). *Stanford* v. *Texas*, 379 U.S. 476 (1965). *Marcus* v. *Search Warrant of Property at 104 E. Tenth St., Kansas City, Mo.*, 367 U.S. 717 (1961). *Marron* v. *United States*, 275 U.S. 192, 196 (1927). *Commonwealth* v. *Smith*, 370 Mass. 335, cert. denied, 429 U.S. 944 (1976). *Commonwealth* v. *Hall*, 366 Mass. 790 (1975). The warrant herein had no reference whatsoever to the items sought to be seized, contrary to the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G. L. c. 276, § 2. Yet the plurality seeks to minimize this violation because of the alleged "good faith" of a magistrate in issuing this grossly defective warrant.

The motion judge ruled, and a majority of the court agrees, the search warrant was constitutionally defective and in violation of Federal and State law because it did not describe with particularity the items sought in the search.[1] *Supra* at 489. See generally *supra* at 500 n.10. The court then concludes that the exclusionary rule requires the suppression of the evidence seized pursuant to the search warrant. Because, however, the plurality finds it necessary to engage in a gratuitous discussion of the wisdom of the rule in this instance, I am compelled to state my views on this issue.

[1] "Such particularity is necessary in order to identify . . . the things to be seized; it both defines and limits the scope of the search and seizure, thereby protecting individuals from general searches, which was the vice of the pre-Revolution writs of assistance." *Commonwealth* v. *Pope*, 354 Mass. 625, 629 (1968).

I point out first that nowhere in the judge's written findings is there a finding that the actions of the magistrate were merely negligent. Indeed, while the judge viewed the police as having acted in good faith,[2] at the hearing on the motion he characterized the actions of the magistrate in these terms: "I saw this search warrant, and when I saw it I had to put my glasses on because I had not seen anything like that before. . . . [T]his warrant is so inappropriate [as] to be plainly unconstitutional," under the State and Federal Constitutions.[3] The judge viewed the warrant as a "general warrant" akin to the colonial "writs of assistance" which led to the enactment of art. 14 of the Massachusetts Constitution and the Fourth Amendment. He regarded the warrant as one that "flies right in the face of the Constitution." He characterized the magistrate's issuance of this warrant as a "judicial blunder." In describing the warrant, he stated he had "never seen anything so plainly on its face a nullity."

A reading of the search warrant in this case reveals that the judge's views were not unduly harsh.[4] Although the plurality agrees that the warrant nowhere described the things the police sought to seize and was thus unconstitutional, the plurality's view of the magistrate's error as being merely one of negligent good faith is supported neither by the record nor the findings of the motion judge. A proper legal definition of "good faith" involves not only a lack of malevolence,[5] but also a reasonable effort to comply with the law. One commentator has defined the good faith "exception" as follows: "[W]hen an officer acts in the good faith belief that his conduct is constitutional *and where he has a reasonable basis for that belief*, the exclusionary rule will not operate" (emphasis added). Ball, Good Faith and

[2] I shall comment further on this point.

[3] The judge also viewed the warrant as defective under G. L. c. 276, §§ 2, 2A.

[4] The warrant used in this murder investigation is reproduced as an appendix to this opinion.

[5] I do not view the conduct of the magistrate, the police, or the office of the district attorney as malevolent.

the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635, 635 (1978). See *United States* v. *Williams*, 622 F.2d 830, 841 & n.4a (5th Cir. 1980) (en banc) (alternative holding), cert. denied, 449 U.S. 1127 (1981) (recognizing that reasonable good faith exception must be grounded on an objective reasonableness) Cf. *Commonwealth* v. *Sherry*, 386 Mass. 682, 697 (1982) (mistake of fact defense requires an objective standard of reasonableness); *Commonwealth* v. *Huffman*, 385 Mass. 122, 126 (1982) (whether "exigent circumstances" present based on objective view of totality of circumstances). The magistrate who utterly fails to describe or even attempt to describe the things to be seized under the search warrant has not made a reasonable effort to comply with the law. Compare *Commonwealth* v. *Rugaber*, 369 Mass. 765 (1976).[6] This is not a case of mere accidental violation of constitutional commands.

I turn now to the conduct of the police, which both the motion judge and the plurality find to have been in "good faith." At the outset, it should be emphasized that an effort to characterize police conduct here as in "good faith" is again neither factually nor legally accurate. The evidence is undisputed that the officer seeking the warrant was an experienced officer who had been on the force for nineteen years, ten of which were as a detective. Other experienced officers were also present. Additionally, the district attorney reviewed the application typed by this officer, and the first assistant district attorney was present at the home of the magistrate when the warrant was issued. It is also undisputed that the form of the warrant used was that used

[6]The plurality points out what, assumably, it believes to be the extenuating circumstances surrounding the issuance of this warrant. In my estimation, however, because everyone involved knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly. Thus, I would hold the officers and the magistrate to a higher standard of good faith based on the circumstances in this case which put them on notice that a defective warrant could easily be issued if proper care were not taken.

under a narcotics statute repealed about eight years earlier. See G. L. c. 94, § 213, repealed by St. 1971, c. 1071, § 2 (now G. L. c. 94C, the Controlled Substances Act). All present at the magistrate's home knew that the form warrant given to the judge was defective in form and substance. According to those present, the judge made only two alterations in this warrant,[7] by changing the caption as to the issuing court and the name of the issuing magistrate.

Even if one puts aside the police officer's experience, there is no justification in treating the "police" separately from the first assistant district attorney, a trained and experienced prosecutor. See *Commonwealth* v. *St. Germain*, Mass. Adv. Sh. (1980) 1807, 1812 n.8 (police are also part of prosecution). To take the position that these law enforcement personnel acted in "good faith" is simply to say that no showing of evil intent has been proved. It cannot be said, however, that they acted reasonably when the officers, knowing from the start that the form warrant was improper, apparently never even read the warrant. Their acquiescence in the acts of the magistrate cannot be viewed as "good faith." The plurality's condonation of this default of responsibility by law enforcement personnel is particularly troubling.[8] In using the approach it has taken, the plurality turns its back on the teaching of history and opens the door to the return of general warrants and writs of assistance.

1. *Judicial error.* Assuming, as does the plurality opinion, that what is involved in this case is not police error but rather judicial error, the plurality points to no cases wherein the supposed good faith but negligent act of a judge who

[7] The testimony of the officer who sought the warrant was that the visit with the judge took approximately twenty-five minutes with only three or four minutes to change the form.

[8] The plurality also stresses that the search, as actually carried out, was within the limits that the police understood the warrant to permit, *supra* at 503, and, in any event, the occupants of the defendant's household did not actually read the warrant, *supra* at 494. Both of these factors appear to be irrelevant in light of our recent decision in *Commonwealth* v. *Taylor*, Mass. Adv. Sh. (1981) 821, 827.

issues a defective warrant is relevant in determining whether the evidence should be suppressed. At the appellate court of last resort in this State, our primary concern is to correct judicial error in all stages of a proceeding. I fail to understand why the "good faith" of a judge should make any difference in this case. Do we not always assume that the judges of all the various courts throughout the Commonwealth carry out their duties in good faith? If our standard of review is to be limited to examining the good faith of the judge, few cases would require reversal, and errors of law would stand uncorrected.

The plurality opinion appears to recognize that suppression of illegally seized evidence may encourage greater care by magistrates in the future, but expresses doubt as to the efficacy of such a rule in deterring judicial error. I strongly disagree with the plurality's reasoning on this point. Our responsibility as the court of last resort in this Commonwealth requires that judicial violations of the Fourth Amendment find no sanction, express or implied, in our opinions. Unless this court "safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." *United States* v. *United States Dist. Court*, 407 U.S. 297, 312 (1972). The language in today's opinion will hardly encourage greater care by judges who issue search warrants. Indeed, the language of the plurality cannot but encourage negligent behavior, a hardly laudable characteristic of judicial conduct. Common sense tells me that greater care will be encouraged if the rule remains as it is, viz., evidence seized under an invalid warrant will be suppressed.

2. *Prior Federal precedent.* Acknowledging, as the plurality does, that the exclusionary rule has not been applied in all circumstances by the Supreme Court of the United States, does not answer the question whether it should be applied in this instance. Admittedly, the Supreme Court has refused to extend the exclusionary rule beyond that established in *Mapp* v. *Ohio*, 367 U.S. 643

(1961). See *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). See also, cases cited by the plurality, *supra* at 501 n.13. The Supreme Court, however, has continued to apply "judicially created means of effectuating the rights secured by the Fourth Amendment." *Stone* v. *Powell*, 428 U.S. 465, 482 (1976). Even those on the Supreme Court who have criticized the exclusionary rule have recognized that the rule should not be eliminated, absent a satisfactory alternative means of protecting Fourth Amendment values. Thus, despite the minority views cited by the plurality opinion, the Supreme Court has not taken the step the plurality appears to favor. Indeed, there is some recent indication that the Court would not accept a good faith exception to the exclusionary rule. See *Taylor* v. *Alabama*, 102 S. Ct. 2664, 2669 (1982) (expressly rejecting any good faith exception to exclusion of confession that was fruit of an illegal arrest).

The cases that have discussed a good faith exception to the exclusionary rule are significant to the points I have made. See *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979); *United States* v. *Peltier*, 422 U.S. 531 (1975). In the *Peltier* case, the Court allowed admission of evidence obtained from a search and seizure where the officers had conducted the search in good faith reliance "upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval." *Id.* at 541. Similarly, in *DeFillippo*, *supra*, the Court allowed admission of evidence seized pursuant to an arrest under an ordinance which was subsequently found invalid. So long as "the arrest was valid when made, the search was valid and the [contraband was] admissible in evidence." 443 U.S. at 37. In both *Peltier* and *DeFillippo*, the *searches were valid* under the then existing law, and, more importantly, there were no search warrants involved. In the instant case, the search was invalid from the beginning.[9] It is one thing to consider

[9]The plurality's reference to the "good faith" exception relied on in *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert.

the reasonable good faith of law enforcement officials who proceed according to then existing legal standards that are later changed, and another to consider, in hindsight, the good intentions of a judge who issued a clearly defective warrant that was invalid at the time issued and is still invalid today. "[C]learly there is a crucial distinction between withholding [the exclusionary rule's] cover from individuals whose Fourth Amendment rights have not been violated — as has been done in the 'standing' cases, . . . *Jones* v. *United States*, 362 U.S. 257 (1960) — and withdrawing its cover from persons whose Fourth Amendment rights have in fact been abridged." *United States* v. *Calandra*, 414 U.S. 338, 364-365 (1974) (Brennan, J., dissenting).

Even assuming that there was a good faith exception for judicial error, it would not apply in this case. Permeating the plurality opinion is the assumption, which is plainly stated at one point in the text, *supra* at 503, 504 that the

---

denied, 449 U.S. 1127 (1981), is less than illuminating. The court in *Williams* stated: "No warrant is involved here, hence nothing that we say applies to factual situations where one has been obtained." *Id.* at 840 n.1. Additionally, the *Williams* majority made it clear that good faith alone was not sufficient; the officer's acts had to be "reasonable" as well. *Id.* at 841 n.4a. No justification can be found in *Williams* for applying its principle to negligent acts, such as are here involved.

The decision in *Williams* was "unusual." *Abell* v. *Commonwealth*, 272 S.E.2d 204, 210 (Va. 1980). Sixteen members of the twenty-four judge court held that evidence seized incident to an arrest should not be suppressed because the arrest was valid. 622 F.2d at 839. Thirteen members of the court, including some of those who joined in the first holding, united in an alternative holding that, even if the arrest were invalid, the exclusionary rule would not be applied because the officer acted under a *reasonable* good faith belief that the arrest was lawful. *Id.* at 846-847. Ten judges, in a concurring opinion, including some of those who joined in the first holding, objected to the majority's alternative holding. The concurrers chastised the court for lack of judicial restraint in writing an alternative holding not necessary to resolve the case, as the entire court agreed that the arrest was valid. The concurrers also asserted that the conclusions reached by the court in the second holding were supported only by dissenting opinions and law review articles. The *Williams* case has had, at best, a sparse following. Most importantly, the *Williams* court was dealing with reasonable conduct, not the kind of conduct here involved.

judge acted "negligently but in good faith." This is a contradiction in terms. The plurality acknowledges that the judge's error "was a serious omission of constitutional significance." *Supra* at 504 n.17. In the circumstances of this case, such error stemmed from a failure on the part of the judge to exercise reasonable care in issuing the warrant. Obviously, the judge did not read the warrant before handing it over to the police. Such behavior cannot be characterized as "good faith." Indeed, Justice Rehnquist, the most vehement critic of the exclusionary rule on the Supreme Court of the United States, has recognized that the deterrent function of the exclusionary rule is served by proscribing negligent as well as wilful behavior: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). In order to be viewed as being in good faith, official action, though later proved to be erroneous, must have been undertaken with a greater degree of care than was exhibited in this case. See note 6 *supra*.

The recent opinions questioning the purposes and functions of the exclusionary rule, as it applies to good faith errors by arresting or searching officers, stress the problems that the exclusionary rule "poses to the policemen who must act on the firing line (unfortunately too often literally so) and under the need to make immediate law enforcement decisions without the luxury of deliberation." *United States* v. *Santucci*, 509 F. Supp. 177, 182 (N.D. Ill. 1981), rev'd on other grounds, 674 F.2d 624 (7th Cir. 1982). The pressures of law enforcement cannot serve as an adequate basis for excusing judicial error. Cf. *Santucci*, *supra* at 182-183

(United States Attorney cannot invoke "policemen in the field" good faith exception to the exclusionary rule).

3. *Judicial integrity.* Although the plurality opinion asserts that the notion of preservation of "judicial integrity fails as a substantial, independent support for the [exclusionary] rule," *supra* at 502, it fails to address adequately whether the imperative of judicial integrity, in this particular instance, would support invocation of the exclusionary rule. See *Stone* v. *Powell*, *supra* at 485 (judicial integrity has limited role in determining whether to apply exclusionary rule *in a particular context*). "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution." *United States* v. *Janis*, 428 U.S. 433, 458-459 n.35 (1976).

One need only turn to history to recognize the dangers to society if the judiciary cannot, or will not, diligently and carefully protect the rights of individuals. See Marsh, Some Aspects of the German Legal System Under National Socialism, 62 L.Q. Rev. 366 (1946); Roetter, The Impact of Nazi Law, 1945 Wis. L. Rev. 516. See also *Korematsu* v. *United States*, 323 U.S. 214 (1944); L. Tribe, American Constitutional Law 1000 (1978).

The imperative of judicial integrity strikes me as being at the very core of Fourth Amendment values. It is appropriate to note, in this context, the impressive words of the Constitution of the Union of Soviet Socialist Republics:

> "Article 55. Citizens of the USSR are guaranteed inviolability of the home. No one may, without lawful grounds, enter a home against the will of those residing in it.
>
> "Article 56. The privacy of citizens, and of their correspondence, telephone conversations, and telegraphic communications is protected by law.
>
> "Article 57. Respect for the individual and protection of the rights and freedoms of citizens are the duty of all state bodies, public organisations, and officials.

> "Citizens of the USSR have the right to protection by the courts against encroachments on their honour and reputation, life and health, and personal freedom and property."

Constitution of the Union of the Soviet Socialist Republics, in 16 Constitutions of the Countries of the World 29 (A. Blaustein & G. Flanz eds. 1982).

We take for granted the meaningless nature of these words because the courts of that nation cannot, or will not, implement them to protect the rights of their citizens. In contrast, John Adams said of James Otis's argument against the colonial writs of assistance that "[t]hen and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born." 2 Legal Papers of John Adams 107 (L. Wroth & H. Zobel eds. 1965).

In this case, the goal of preserving judicial integrity is a sufficient justification for applying the exclusionary rule, since it is a judge who committed the violation. "It is the duty of [judges] to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd* v. *United States*, 116 U.S. 616, 635 (1886).

What becomes of judicial integrity when three members of this court appear to condone the egregious judicial error involved in this case? And what is left of the most significant protection embedded at the core of the Fourth Amendment and art. 14 values, namely the role of a neutral and detached magistrate in determining the validity and terms of a search? See *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979); *Connally* v. *Georgia*, 429 U.S. 245 (1977); *Shadwick* v. *Tampa*, 407 U.S. 345 (1972); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). The crucial role of a magistrate is to determine whether probable cause for a search warrant exists and, just as importantly, to describe with particularity the place to be searched and the things to be seized. *Stanford* v. *Texas*, 379 U.S. 476 (1965). *Marcus* v. *Search*

Warrant of Property at 104 E. Tenth St., Kansas City, Mo., 367 U.S. 717 (1961).[10]

The particularity requirements of the Fourth Amendment are "precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford* v. *Texas, supra* at 481. In the instant case, the plurality condones "a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States*, 232 U.S. 383, 394 (1914). Although "[t]he criminal goes free, if he must, . . . it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio*, 367 U.S. at 659.

The language the plurality opinion uses in reaching the correct result mandated by State and Federal law does unnecessary harm to a body of law now well-established in our jurisprudence. The case is "serious" but there is nothing "challenging" about this issue except the plurality's unnecessary and unhappy incursion into a field of law well rooted in American history. One cannot but wonder as to the purpose of such treatment of an issue so clear-cut. It would be well to keep in mind that what was involved here is a search of a home, the most sacrosanct of places under Fourth Amendment jurisprudence. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'The right of the

[10] One should not have to add that, in every one of the decisions cited here which involves a defective warrant issued by a magistrate, the fruits of the search conducted under the authority of the defective warrant were suppressed.

people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.' *Silverman* v. *United States*, 365 U.S. 505, 511 [1961]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house." *Payton* v. *New York*, 445 U.S. 573, 589-590 (1980). The violations of the Fourth Amendment and our State laws involved here were not merely "negligent." They were inexcusable.[11] The warrant was clearly defective. The search of this dwelling was as though without a warrant. The evidence illegally obtained as a result must be suppressed without question.

[11] I point out also that despite the plurality's attempt to excuse the conduct here on the ground that the defendant was "at liberty" (*supra* at 497) and that there was need for "prompt action" (*supra* at 504 n.17), the evidence shows that an arrest warrant had been issued for the defendant, and that the police knew he was not at home and dispatched a team of officers who arrested him at another place at the same time the search under the defective warrant was conducted.

Appendix.

To the Justices of the Municipal Court of the ~~Dorchester~~ ROXBURY District, holden in said Dorchester District for the transaction of criminal business within the County of Suffolk:

of Boston in the County of Suffolk, Police Officer, on oath informs the said Court, that he has reason to believe that any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, is kept or deposited by OSBORNE SHEPPARD some person or persons unknown to the said in certain rooms in the 2-UP-&-BASEMENT story of the building situated and numbered 42 in DECKARD ST. street in said city and within the judicial district of said Court and prays a Warrant to search there for the same.

Received and sworn to before this Court, this 6TH day of MAY in the year of our Lord one thousand nine hundred and seventy NINE

Clerk.

Commonwealth of Massachusetts

SUFFOLK, TO WIT:

To the Sheriff of our County of Suffolk, his Deputies, and the Constables and Police Officers of the City of Boston in said County: GREETING.

We COMMAND YOU, and each of you forthwith, with necessary and proper assistants, to enter in the day time or in the night time in the mentioned in the above information, and there diligently to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance, and to seize and securely keep the same until final action, and to arrest the person or persons in whose possession it is found, together with all persons present if any of the aforesaid substances is found, and bring them before said Court to be dealt with according to law, and return this warrant with your doings thereon.

You are also commanded, in like manner, to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you have the said substances and persons or either of them.

TOBIAH F. FEENEY MAIL, TO 142 COURT ROXBURY DIVISION

WITNESS, ~~PAUL H. KING~~, Esquire, at Boston, in said ~~Dorchester~~ District, this SIXTH day of MAY in the year of our Lord one thousand nine hundred and seventy MAY 6

Joseph F. Feeney Clerk
Asst. Justice, Mun. Trial Court

LYNCH, J. (dissenting). It is undisputed that the search warrant used in this case to seize highly probative evidence linking the defendant to the murder of Sandra Boulware was formally defective. At issue in this appeal is the question whether the failure of the issuing magistrate to include in a search warrant, issued on probable cause, a list of the items to be seized or to incorporate such a list by reference to the police affidavit necessitates the application of the exclusionary rule where the search and seizure is limited to the items described in the affidavit. This court has concluded that the decisions of the United States Supreme Court mandate suppression of this evidence. *Supra* at 489, 509. I believe, however, that the majority's conclusion represents a misreading of the relevant Supreme Court precedent and that its application of the exclusionary rule is inappropriate on the facts in this case. Accordingly, I dissent. I believe that a careful exploration of the purposes behind both the particularity requirement of the Fourth Amendment to the United States Constitution, which the police and judge inadvertently violated here, and the exclusionary rule demonstrates that the trial judge's admission of this evidence was proper on these facts.

The Supreme Court has noted that the particularity requirement was included in the Fourth Amendment to protect citizens from the general warrants and writs of assistance that were commonly used by the British against the colonists. *Boyd* v. *United States*, 116 U.S. 616, 624-627 (1886). These general warrants granted British officers unbridled discretion to search the place and belongings of the colonists and placed "the liberty of every man in the hands of every petty officer." *Id.* at 625. See also *Marron* v. *United States*, 275 U.S. 192, 195-196 (1927). The particularity requirement of the Fourth Amendment is directed at this specific evil. It requires that those searches that are deemed necessary should be as limited as possible: "[T]he problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). Also, evi-

dence seized under a general warrant is unlikely to be supported by probable cause. Specificity in the warrant limits the potential for such abuse. *Id.*

In the present case none of the evils associated with searches under such warrants occurred. At all times, Detective O'Malley and his colleagues conducted their search for evidence in a manner that scrupulously adhered to the limits that were specified in the affidavit and that they believed in good faith the judge had authorized. The police searched only in the places particularly described in the warrant and they seized only the relevant murder evidence described in Detective O'Malley's affidavit. They neither assumed nor exercised any discretion in the search. The police officers sought prompt judicial approval for their search warrant and searched no further than specified in the affidavit. No "rummaging" among the defendant's belongings occurred. In the face of the dedication shown by these police officers to the spirit and purposes of the Fourth Amendment, abstract fears of "general warrants" and "writs of assistance" are completely misplaced.

More importantly, even conceding that the detective's carrying the affidavit on his person rather than attaching it to the warrant rendered the warrant formally defective, I believe that application of the exclusionary rule to suppress the evidence seized brings about too harsh a result. The plurality opinion correctly points out that the substantial, and perhaps only, justification for the exclusionary rule relied upon by a majority of the justices of the Supreme Court is the goal of deterring unconstitutional conduct by the police and other law enforcement personnel. *Supra* at 502. The plurality opinion also recognizes the existence of factors in this case which, in my opinion, militate against the application of the exclusionary rule. That opinion acknowledges that the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge; the defect in the warrant was not harmful to the defendant in the circumstances of the actual search; the search was conducted

in the same way and with the same results as it would have been conducted if the warrant had not been defective; the error in the warrant consisted of the judge's failure, negligently but in good faith, to strike out certain clearly inapplicable words printed on the blank form and to attach to it (or to incorporate by reference to the affidavit) a list of the items to be seized; the Supreme Court has not applied the exclusionary rule to a judge's error in such circumstances; there may be reasonable distinctions between police misconduct and the errors of magistrates; the judge's conduct was neutral and detached; he did not undertake the role of the police and become concerned with ferreting out crime; the exclusionary rule is not well tailored toward deterring judicial misconduct since the suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police; the defendant was not prejudiced by the magistrate's error; and various members of the Supreme Court have made statements critical of the application of the exclusionary rule in particular circumstances (not unlike those found to exist here). *Supra* at 503-506. The majority nevertheless concluded that the exclusionary rule requires the suppression of the evidence seized. I believe that the factors summarized above, which three members of this court apparently agree are of significance, compel the conclusion that the evidence seized at 42 Deckard Street need not be suppressed under the United States or the Massachusetts Constitution.

The Supreme Court has noted with concern that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." *Rakas* v. *Illinois*, 439 U.S. 128, 137 (1978). Frequently the evidence sought to be excluded is "the most probative information bearing on the guilt or innocence of the defendant." *Stone* v. *Powell*, 428 U.S. 465, 490 (1976). Consequently, "[a]pplication of the [exclusionary] rule . . . deflects the

truthfinding process and often frees the guilty. The [resulting] disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice." *Id.* at 490-491.

To minimize the social cost resulting from the indiscriminate application of the exclusionary rule, the Supreme Court has held that this judicially made rule is not coextensive with the Fourth Amendment. *Stone* v. *Powell, supra* at 486, 488-489. *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974). Rather than applying the exclusionary rule reflexively, the Court has stated that judges should weigh the value of deterrence of police misconduct gained in applying the rule against the "further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Stone* v. *Powell, supra*, quoting from *Alderman* v. *United States*, 394 U.S. 165, 175 (1969).

Thus, it is clear that the policies underlying the exclusionary rule are not absolute and they must be evaluated in light of competing considerations: "As with any remedial device, the application of the [exclusionary] rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra, supra* at 348. Here, application of the exclusionary rule will serve no beneficial purpose. Police misconduct will not be deterred because none occurred. The human error committed by the judge harmed no rights of the defendant, as nothing beyond the evidence listed in the affidavit was searched for or seized. By contrast, application of the exclusionary rule

will result in the very substantial harm of withdrawing highly probative evidence from the trier of fact.

In discussing the need for applying the exclusionary rule under the Fifth Amendment to the Constitution of the United States, the Supreme Court has cautioned that before we penalize official misconduct we must consider whether the sanction serves a valid and useful purpose. *Michigan* v. *Tucker*, 417 U.S. 433, 446 (1974). I can perceive no valid and useful purpose for applying the exclusionary rule to the good faith search and seizure performed by the police here, albeit under a defective warrant. The failure of the judge or the police to attach the affidavit to the revised warrant form was merely a harmless error, but under the majority's holding the consequences are Draconian: for want of a staple, highly probative evidence is lost. Such dedication to rigid formality is commanded neither by the Constitution nor by logic. I respectfully dissent.

Office-Supreme Court, U.S.
FILED
MAR 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Respondent's Brief in Opposition.

JOHN REINSTEIN,*
CIVIL LIBERTIES UNION OF MASSACHUSETTS,
47 Winter Street,
Boston, Massachusetts 02108.
(617) 482-3170

NANCY GERTNER,
SILVERGLATE, GERTNER, BAKER & FINE,
33 Broad Street,
Boston, Massachusetts 02109.
(617) 723-2624

**Counsel of Record*

TABLE OF CONTENTS

QUESTION PRESENTED 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT

1. THE SEARCH IN THIS CASE WAS CONDUCTED UNDER A WARRANT WHICH WAS CLEARLY INVALID UNDER THE PRIOR DECISIONS OF THIS COURT. 8

2. THE SEARCH CONDUCTED BY THE POLICE WAS NEITHER REASONABLE NOR CONDUCTED IN GOOD FAITH. 12

CONCLUSION 19

TABLE OF AUTHORITIES CITED

CASES

Commonwealth v. Sheppard, 387 Mass. 488 (1982) 2,6,11,14,18

Lo-Ji Sales, Inc. v. New York, 422 U.S. 319 (1979) 9

Marcus v. Search Warrants 9

Marron v. United States 9

Stanford v. Texas 9

Stone v. Powell 13,14

Williams v. United States 13

STATUTES

Mass. Gen. Laws, c. 94, §213 4

Mass. Gen. Laws, c. 272 §2 11

AUTHORITIES

Ball, Good Faith and the Fourth Amendment: The "Reasonable Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology, 635. 13

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. 82-963

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OSBORNE SHEPPARD,
Respondent

On Writ of Certiorari to the
Supreme Judicial Court for the
Commonwealth of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the Supreme Judicial Court of Massachusetts erred in refusing to recognize a good faith exception to the exclusionary rule where there was no

reasonable basis in fact for the asserted "good faith" belief on the part of the police officers who conducted the search that the warrant on which they relied was valid.

STATEMENT OF FACTS

The facts concerning the investigation which led to the application for a warrant in this case are set out in the opinion of the Massachusetts Supreme Judicial Court. Commonwealth v. Sheppard, 387 Mass. 488, 489-495 (1982)(Cert. Pet., Appendix A, pp. 3-18). Only the facts pertaining to the application for a search warrant and its issuance are stated here.

On Sunday May 6, 1979, as a result of his investigation into the death of Sandra Boulware, Detective Peter O'Malley of the Boston Police Department, prepared an

affidavit in support of an application for warrants to arrest the respondent, Osborne Sheppard, and to search his home at 42 Deckard Street in Roxbury for certain evidence, including a bottle of liquor, a woman's jacket and any of the victim's possessions that might be found there.[1] The affidavit was reviewed by the District Attorney for Suffolk County and his first assistant. Because it was a Sunday and the courts were closed, O'Malley was unable to locate a suitable form for the

---

[1]The affidavit listed the following property to be seized: "A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possession of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim."

search warrant, but he did find a printed form from the Dorchester Municipal Court which was once used for drug searches.[2] The trial court specifically found that O'Malley knew the form was inappropriate for this case. He crossed out the words "controlled substances" on the cover of the form, but he left unchanged the body of the form which, when signed, would constitute the search warrant.

Accompanied by several other police officers and the first assistant district attorney, O'Malley went tothe home of a judge of the Roxbury Municipal Court to present the application for the warrants. After the Judge had reviewed the affidavit

---

[2]The warrant prepared by the police and the district attorney's office and presented to the magistrate for his signature was on a form used under a narcotics statute which had been repealed in 1971. See Mass. Gen. Laws c. 94, Sec. 213, repealed by Mass. St. 1971, c. 1071.

and had questioned O'Malley about its substance, there was some discussion about the form. The judge acknowledged that the form was not appropriate. He searched his library for the proper form, but was unable to find one. He then told the police and the assistant district attorney that he would revise the form which they had brought with them. The judge took the form from Detective O'Malley and, in his presence, made some changes in the form and then signed it.[3]

In fact, the judge made no substantive changes in the form, which authorized the police "to search for any controlled substance, article, implement

---

[3]Detective O'Malley testified that he "observed [the judge] crossing out and writing in words on papers himself." Thus, he must have known that the judge did not make any significant changes in the form.

or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance."[4] The signed warrant made no reference to the items specified in Detective O'Malley's affidavit, and the affidavit was not attached to the warrant. The warrant was then delivered to O'Malley for execution.[5]

---

[4]The judge made only two alterations in the form, changing the caption as to the issuing court, from Dorchester to Roxbury, and the name of the issuing magistrate.

[5]The trial judge found that at this point the judge "informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search requested," (Pet. for Cert., App. B, p. 22), and this finding was apparently relied upon by the Supreme Judicial Court in concluding that the police reasonably believed the warrant was adequate. See Commonwealth v. Sheppard, supra, 387 Mass. at 502. Detective O'Malley testified that the judge told him "he would adjust the warrant." (Transcript of hearing, September 15, 1980, p. 47). There was no further testimony about the judge's standards.

Over two hours later, O'Malley and several other police officers went to the defendant's home at 42 Deckard Street. The detective spoke with the defendant's mother and sister, showed them the warrant and entered the house.[6] In the course of the search, the police discovered and seized, among other things, two earrings, some wire and a number of items which appeared to be bloodstained. Each of these items was introduced in evidence at the defendant's trial.

---

[6]The trial court made the following finding: "O'Malley orally informed them that he had a warrant...There was no evidence that either occupant asked to see it or that it was read spontaneously to them." (Pet. for Cert., App. B, pp. 23-24.) O'Mally testified, however, that "...we spoke to the defendant's mother and sister and I showed them the warrant." (Transcript of hearing, September 15, 1980, p. 49.)

REASONS FOR DENYING THE WRIT

1. THE SEARCH IN THIS CASE WAS CONDUCTED UNDER A WARRANT WHICH WAS CLEARLY INVALID UNDER THE PRIOR DECISIONS OF THIS COURT.

It is undisputed that the warrant in this case failed to satisfy the minimum requirements of the Fourth Amendment and was clearly invalid under the prior decisions of this court. The Fourth Amendment embodies not only a substantive right, it also contains a procedure for enforcing that right. It guarantees the right to be free from "unreasonable searches and seizures", and it provides the means of protecting against such searches and seizures, the requirement of a warrant, issued by a neutral magistrate, upon a showing of probable cause. It also limits the authority to issue warrants to those "particularly describing the... persons or things to be seized." The

rationale for this requirement was stated in Marron v. United States, 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Stanford v. Texas, 379 U.S. 476 (1965); Marcus v. Search Warrants, 367 U.S. 717 (1961).

Here, the warrant authorizing the search of the defendant's home did nothing to limit "the discretion of the officers executing the warrant." It not only failed to describe with "particularity" the things which were to be seized, it failed to describe them at all. The

warrant signed by the magistrate generally authorized the seizure of drugs and drug paraphernalia. It did not mention the bottle of liquor, the woman's jacket, the wire, the victim's possessions or any of the other items described in the affidavit. It did not incorporate or otherwise refer to the affidavit, and the affidavit was not attached to the warrant.

The judge who heard, and denied, the motion to suppress the evidence seized by the police found that the warrant was "so inappropriate as to be plainly unconstitutional" and observed that he had "never seen anything so plainly on its face a nullity. "The Massachusetts Supreme Judicial Court agreed. It concluded that the the warrant was defective in that it "failed to describe the items sought to be seized" and

therefore "violated the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights and G.L. c. 272, sec. 2." Commonwealth v. Sheppard, supra, 387 Mass. at 499-500. 501.[7]

The Commonwealth of Massachusetts does not challenge the correctness of this conclusion. Rather, it suggests that the Fourth Amendment violations were merely "technical" and, accordingly, that the

---

[7] Particularity in the description of the things to be seized is required under Article 14 of the Declaration of Rights ("special designation of the persons or objects of search, arrest, or seizure"), and the Massachusetts statute governing the issuance of search warrants, Mass. Gen. Laws, c. 272, Sec. 2 ("Search warrants shall designate the building...to be searched and shall particularly describe the property or articles to be searched for.").

police officers were acting in "reasonable good faith." It contends that the Supreme Judicial Court should have recognized a reasonable good faith exception to the exclusionary rule and should have found that the evidence obtained in the course of the unlawful search of the defendant's home was admissible.

2. THE SEARCH CONDUCTED BY THE POLICE WAS NEITHER REASONABLE NOR CONDUCTED IN "GOOD FAITH".

This is not an appropriate case for carving out a "good faith" exception to the exclusionary rule. If applicable to the facts of this case, the proposed exception would swallow the rule. The violation of the Fourth Amendment in this case --the conduct of a search which was not authorized by the warrant-- was anything but "technical," and the actions

of the police, in failing to heed the contents of the warrant, were anything but reasonable.

Many of the judges and commentators who have considered the adoption of such an exception have concluded that it should be invoked only upon a showing that the officer's belief in the lawfulness of the search was objectively reasonable.[8] Massachusetts concedes in its Petition for Certiorari that this is the proper

---

[8] See, e.g., Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635; Williams v. United States, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied 449 U.S. 1127 (1981); Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).

standard.[9] Here, however, the conduct of the officials conducting the search fails any objective test of reasonableness. As Justice Liacos noted in his concurring opinion in the Supreme Judicial Court:

> To take the position that these law enforcement personnel acted in "good faith" is simply to say that no showing of evil intent has been proved. It cannot be said, however, that the officers acted reasonably...

Commonwealth v. Sheppard, supra, 387 Mass. at 513.

The detective who was reponsible for the preparation of the warrant application was an experienced officer with nineteen years on the police

---

[9] Petition for Certiorari, p. 18 (citing Justice White's formulation of the proposed exception to the exclusionary rule in his dissenting opinion in Stone v. Powell, supra, as having "particular applicability to the circumstances of this case").

force.[10] The application for the warrant was prepared with the assistance of the District Attorney and the First Assistant District Attorney, who also accompanied the police to the magistrate's home to present the application for the warrant. Both the detective and the prosecutor knew that the warrant form which they had prepared for the magistrate to sign was not the proper form. They discussed this fact with the magistrate before the warrant was signed. They were present when the magistrate made some perfunctory changes in the form in an attempt to adapt it to the needs of the case. After the warrant had been modified

---

[10] Detective O'Malley was particularly experienced in the investigations of homicides and knowledgeable about the procedure for obtaining a search warrant.

and signed by the magistrate, it was returned to them for execution and they had ample opportunity to review it.

The record does not specifically disclose whether the police officers or the assistant district attorney who accompanied them to the judge's house ever read the warrant after it had been slightly modified and signed by the judge. It suggests that they did not. If they had read the warrant, they would have known--and they certainly should ahave known--that it was insufficient. The warrant remained a warrant authorizing the seizure of drugs and drug paraphernalia. The judge had made no substantive changes, leaving it in precisely the form which they knew to be deficient. The facial deficiency of the warrant was still obvious. Given the considerable

experience of the police officers and the participation of senior members of the district attorney's office in the application for the warrant, they also should have known that this deficiency would render the warrant, and any search conducted under its authority, invalid.

If the police failed to read th warrant after it had been modified and signed by the judge, there is even less reason to conclude that their behavior was reasonable. Under these circumstances, a reasonably prudent person would have read the warrant--and read it very carefully--taking special care to see that it was in the proper form.

> ...because everyone knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly.

Commonwealth v. Sheppard, supra, 387 Mass. at 512 n. 6 (Liacos, J., concurring).

In either case, whether they read the warrant and disregarded its plain language or simply failed to read it at all, there is no basis for the assertion that the police acted reasonably and in good faith. A search warrant is not a mere formality. It is central to the protection provided by the Fourth Amendment. If the police are not required to read the warrant, or may disregard its contents, then the warrant requirment will be meaningless, and the Fourth Amendment a hollow promise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

John Reinstein
Civil Liberties Union
of Massachusetts
47 Winter Street
Boston, Mass. 02108
(617) 482-3170
Counsel of Record

Nancy Gertner
Silverglate, Gertner,
Baker & Fine
33 Broad Street
Boston, Mass. 02109
(617) 723-2624

Attorneys for Respondent

Supreme Court, U.S.
FILED
MAR 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

No. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF

The Commonwealth submits a reply brief solely to clarify for the court the application of Art. 14 of the Massachusetts Declaration of Rights and Mass. Gen. Laws c. 276, §2, referred to in Respondent's Brief in Opposition at 11.

The issue in the instant case is application of the federally created exclusionary rule. Neither Art. 14 nor G.L. c. 276, §2 mandates the exclusion

of illegally seized evidence. It was not until this court's decision in Mapp v. Ohio, 367 U.S. 643 (1961) and then solely upon that authority, that illegally seized evidence was held to be inadmissible in Massachusetts. Commonwealth v. Spofford, 343 Mass. 703, 706 (1962); Commonwealth v. Wilkins, 243 Mass. 356 (1923).

Therefore, whether the warrant at issue is insufficient under either Art. 14 or G.L. c. 276, §2 is irrelevant to question of whether the items seized should have been excluded.

Respectfull submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: Barbara A. H. Smith

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Office-Supreme Court, U.S.
FILED
SEP 9 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1771, 82-963 and 82-1711

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

OSBORNE SHEPPARD

STATE OF COLORADO, PETITIONER

v.

FIDEL QUINTERO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. In No. 82-1771, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable reliance on a search warrant that is subsequently held to be defective for lack of probable cause.

2. In No. 82-963, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable reliance on a search warrant supported by probable cause but later held to be technically defective for failure to incorporate the specification of items to be seized contained in the warrant application.

3. In No. 82-1711, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in the reasonable belief that the warrantless arrest of a burglary suspect did not violate the Fourth Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption in No. 82-1771, Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo were appellees below and are respondents here.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Summary of argument	18
Argument:	
I. As a judicially created rule of evidence, the exclusionary rule may appropriately be modified in the light of experience	27
A. The only viable justification for the exclusionary rule is its presumed deterrent effect on unlawful police conduct	31
B. The policy of deterrence dictates a cost-benefit approach to the application of the exclusionary rule	34
II. The costs of the exclusionary rule outweigh its benefits when it is applied to suppress evidence obtained in a search and seizure that a reasonably well-trained officer would not have recognized as a violation of the Fourth Amendment	38
A. The presumed benefits of the exclusionary rule are not realized by applying it to suppress evidence obtained in searches or seizures that were not recognizably violative of the Fourth Amendment	40
B. The reasons for applying the exclusionary rule are most remote when law enforcement officers have relied on a judicially-issued search warrant	57
C. In light of the exclusionary rule's inability to fulfill its deterrent purpose when applied to reasonable mistakes, its costs are higher than our system of criminal justice can afford	68
D. The objections to a reasonable mistake exception to the exclusionary rule are insufficient to overcome the need for modification	77
Conclusion	88

TABLE OF AUTHORITIES

Cases: Page

Agnello v. *United States*, 269 U.S. 20 56
Aguilar v. *Texas*, 378 U.S. 108 ..... 9, 64, 65
Alderman v. *United States*, 394 U.S. 165 ..... 19, 35
Arkansas v. *Sanders*, 442 U.S. 753 ..... 25, 76
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 ..28, 49, 62, 72, 74, 87
Brewer v. *Williams*, 430 U.S. 387 28
Brown v. *Illinois*, 422 U.S. 590 ..... 44, 45, 63, 65
Brown v. *Texas*, 443 U.S. 47 48
Cady v. *Dombrowski*, 413 U.S. 433 50
California v. *Minjares*, 443 U.S. 916 28
Chambers v. *Maroney*, 399 U.S. 42 66
Chapman v. *California*, 386 U.S. 18 68
Chapman v. *United States*, 365 U.S. 610 50
Coleman v. *Alabama*, 399 U.S. 1 85
Colorado v. *Bannister*, 449 U.S. 1 51
Coolidge v. *New Hampshire*, 403 U.S. 443 ....28, 50, 59, 62
Desist v. *United States*, 394 U.S. 244 ..... 18, 31, 37
Donovan v. *Federal Clearing Die Casting Co.*, 695 F.2d 1020 37
Elkins v. *United States*, 364 U.S. 206 ..... 32, 33, 40
Franks v. *Delaware*, 438 U.S. 154 ..... 55, 65
Gifford v. *State*, 630 S.W.2d 387 ..... 47, 61
Go-Bart Importing Co. v. *United States*, 282 U.S. 344 56
Gouled v. *United States*, 255 U.S. 298 56
Government of the Virgin Islands v. *Rasool*, 657 F.2d 582 52
Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982).. 79, 80
Harris v. *New York*, 401 U.S. 222 35
Harryman v. *Estelle*, 616 F.2d 870 85
Hill v. *California*, 401 U.S. 797 55
Holloman v. *Commonwealth*, 221 Va. 947, 275 S.E. 2d 620 79
Illinois v. *Andreas*, No. 81-1843 (July 5, 1983)..... 51
Illinois v. *Gates*, No. 81-430 (June 8, 1983) ..... *passim*
Illinois v. *Lafayette*, No. 81-1859 (June 20, 1983).. 51
Irvine v. *California*, 347 U.S. 128 40
Johnson v. *United States*, 333 U.S. 10 ..... 63, 64

Cases—Continued: Page

Jones v. *United States*, 362 U.S. 257 64
Linkletter v. *Walker*, 381 U.S. 618 ..... 33, 37, 74
Lopez-Mendoza v. *Immigration and Naturalization Service*, 705 F.2d 1059 38
Mapp v. *Ohio*, 367 U.S. 643 ..... 18, 27, 30, 31, 40, 55, 56
Michigan v. *DeFillippo*, 443 U.S. 31 54
Michigan v. *Long*, No. 82-256 (July 6, 1983) 51
Michigan v. *Tucker*, 417 U.S. 433 43
Milton v. *Wainwright*, 407 U.S. 371 84
Nathanson v. *United States*, 290 U.S. 41 65
New York v. *Belton*, 453 U.S. 454 ..... 49-50, 51, 53
O'Connor v. *Donaldson*, 422 U.S. 563 84
Oregon v. *Hass*, 420 U.S. 714 35
People v. *Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 ..... 47, 48
People v. *Defore*, 242 N.Y. 13, 150 N.E. 585, cert. denied, 270 U.S. 657 ..... 23, 69
People v. *Schreyer*, 640 P.2d 1147 15
Rakas v. *Illinois*, 439 U.S. 128 35
Rawlings v. *Kentucky*, 448 U.S. 98 35
Robbins v. *California*, 453 U.S. 420 ..... 28, 53
Scheuer v. *Rhodes*, 416 U.S. 232 74
Schneckloth v. *Bustamonte*, 412 U.S. 218 ..... 28, 53
Scott v. *United States*, 436 U.S. 128 78
Shadwick v. *City of Tampa*, 407 U.S. 345 60
Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 56
Spinelli v. *United States*, 393 U.S. 410 ..... 9, 64
State v. *Lien*, 265 N.W.2d 833 59
State v. *Nolting*, 312 Minn. 449, 254 N.W.2d 340 59
Stone v. *Powell*, 428 U.S. 465 ..... *passim*
Stovall v. *Denno*, 388 U.S. 293 86
Terry v. *Ohio*, 392 U.S. 1 63
Texas v. *Brown*, No. 81-419 (Apr. 19, 1983) 51
Texas v. *White*, 423 U.S. 67 51
Tirado v. *Commissioner*, 689 F.2d 307 38
United States v. *Acosta*, 501 F.2d 1330, modified, 509 F.2d 539, cert. denied, 423 U.S. 891 59
United States v. *Ajlouny*, 629 F.2d 830, cert. denied, 449 U.S. 1111 ..... 47, 79, 84
United States v. *Alvarez-Porras*, 643 F.2d 54, cert. denied, 454 U.S. 839 61

Cases—Continued: Page

United States v. *Bazzano*, No. 81-1936 (3d Cir. June 17, 1983) 38
United States v. *Blackwell*, 694 F.2d 1325 85
United States v. *Bulman*, 667 F.2d 1374 85
United States v. *Caceres*, 440 U.S. 741 ..... 54, 55
United States v. *Calandra*, 414 U.S. 338 ..... *passim*
United States v. *Ceccolini*, 435 U.S. 268 ..... 19, 28, 36
United States v. *Civella*, 666 F.2d 1122 85
United States v. *Cortez*, 449 U.S. 411 51
United States v. *Downing*, 665 F.2d 404 79
United States v. *Hasting*, No. 81-1463 (May 23, 1983) 60
United States v. *Havens*, 446 U.S. 620 ..... 19, 35, 36, 42
United States v. *Hill*, 500 F.2d 315 61
United States v. *Hill*, 447 F.2d 817 38
United States v. *Janis*, 428 U.S. 433 ..... *passim*
United States v. *Jeffers*, 342 U.S. 48 56
United States v. *Johnson*, 457 U.S. 537 ..... 24, 37, 42
United States v. *Karathanos*, 531 F.2d 26, cert. denied, 428 U.S. 910 63
United States v. *Knotts*, No. 81-1802 (Mar. 2, 1983) 51
United States v. *Lee*, 540 F.2d 1205, cert. denied, 429 U.S. 894 38
United States v. *Lefkowitz*, 285 U.S. 452 64
United States v. *Mahoney*, No. 82-1452 (5th Cir. Aug. 22, 1983) 43, 47, 78, 84
United States v. *Martinez-Fuerte*, 428 U.S. 543 51
United States v. *McCulley*, 673 F.2d 346 85
United States v. *Nolan*, 530 F. Supp. 386 ..... 47, 77, 78, 79
United States v. *Payner*, 447 U.S. 727 35
United States v. *Peltier*, 422 U.S. 531 ..... 34, 37, 43, 79
United States v. *Ramsey*, 431 U.S. 606 51
United States v. *Rosales-Lopez*, 617 F.2d 1349, aff'd, 451 U.S. 182 85
United States v. *Ross*, 655 F.2d 1159, rev'd, 456 U.S. 798 ..... 52-53, 61, 72, 75, 76, 88
United States v. *Salvucci*, 448 U.S. 83 35
United States v. *Schipani*, 435 F.2d 26, cert. denied, 401 U.S. 983 38

Cases—Continued: Page

United States v. *Shorter*, 600 F.2d 585 62
United States v. *Tateo*, 377 U.S. 463 76
United States v. *Torres*, 659 F.2d 1012, cert. denied, 455 U.S. 926 85
United States v. *Travisano*, 560 F. Supp. 627, pending on appeal, No. 83-1159 (2d Cir., filed Apr. 28, 1983) 63
United States v. *United States District Court*, 407 U.S. 297 63
United States v. *Ventresca*, 380 U.S. 102 ..... 63, 64
United States v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983) 51
United States v. *Watson*, 423 U.S. 411 ..... 51, 64
United States v. *West*, 670 F.2d 675, cert. denied, 457 U.S. 1124 85
United States v. *Williams*, 622 F.2d 830, cert. denied, 449 U.S. 1127 ..... 45-47, 48, 77, 78
United States v. *Wilson*, 528 F. Supp. 1129 47
United States v. *Winsett*, 518 F.2d 51 38
United States ex rel. Sperling v. *Fitzpatrick*, 426 F.2d 1161 38
Valley Forge Christian College v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 85
Walder v. *United States*, 347 U.S. 62 35
Weeks v. *United States*, 232 U.S. 383 ..... 18, 27, 30, 33, 56
Williams v. *United States*, 401 U.S. 646 37
Wolf v. *Colorado*, 338 U.S. 25 ..... 32, 40

Constitution, statutes and rule:

U.S. Const.:
Art. III 85
Amend. IV ..... *passim*
Amend. V (Double Jeopardy Clause) 76
Federal Magistrates Act of 1968, 28 U.S.C. (& Supp. V) 631 *et seq.*:
28 U.S.C. (Supp. V) 631(b)(1) 60
28 U.S.C. (Supp. V) 631(b)(2) 60
28 U.S.C. (Supp. V) 631(i) 60
28 U.S.C. 637 60

Constitution, statutes and rule—Continued: Page

Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1801-1811 84
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
42 U.S.C. 1983 ..... 74, 86
Colo. Rev. Stat. § 16-3-308 (Supp. 1982) 16, 18
Fed. R. Crim. P. 41(c)(2)(D) 62

Miscellaneous:

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) 50
Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964) 65, 82
Attorney General's Task Force on Violent Crime, Final Report (1981) 72
Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635 (1978) 47, 78
Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557 (1975) 86
Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35 (1982) 47, 78
Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979) 70, 71, 74
H. Friendly, *Benchmarks* (1967) 44, 67, 81
Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965) 33
Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 Wash. U.L.Q. 621 (1975) 82, 87
Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L.J. 1065 (1982) 50, 82, 87
P. Johnson, *New Approaches to Enforcing the Fourth Amendment* (Working Paper, Sept. 1978), quoted in 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (Supp 1982) 62

Miscellaneous—Continued Page

Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027 (1974) 32, 47, 50, 62-63, 79
LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391 (1965) 50
1 W. LaFave, *Search and Seizure* (Supp. 1982) 69
W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (1978):
Vol. 1 56
Vol. 2 63
L. Levy, *Against the Law: The Nixon Court and Criminal Justice* (1974) 61
C. McCormick, *Handbook of the Law of Evidence* (E. Cleary ed. 1972) 39
Model Code of Pre-Arraignment Procedure (1975) .. 44
National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* (Dec. 1982) 70, 71
Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) 33, 41, 82
Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. Just. Ethics 28 (1982) 78
Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361 (1981) 44, 47, 55-56, 62, 78
The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 69
M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, 95 F.R.D. 211 (1982) 76
Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, 1 Crim. Just. Ethics 16 (1982) 39, 72, 87
Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 215 (1978) 68
Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736 (1972) 44, 49

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1771

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.

No. 82-963

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

OSBORNE SHEPPARD

No. 82-1711

STATE OF COLORADO, PETITIONER

v.

FIDEL QUINTERO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, submits this brief for the United States as petitioner in No. 82-1771 and as amicus curiae in

support of the petitioners in Nos. 82-963 and 82-1711.[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) and the ruling of the district court suppressing evidence (*id.* at 9a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1983 (Pet. App. 7a). A petition for rehearing was denied on March 4, 1983 (*id.* at 8a). The petition for a writ of certiorari was filed on April 29, 1983, and granted on June 27, 1983 (J.A. 151). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. *No. 82-1771*—On October 2, 1981, a five-count indictment was returned in the United States District Court for the Central District of California charging respondents with conspiring to possess and distribute cocaine, in violation of 21 U.S.C. 846 (Count I) (J.A. 27-29). In addition, respondents were variously charged in substantive counts with the possession of cocaine (Counts II, III and V) and methaqualone (Count IV) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (J.A. 29-30). Respondents thereafter moved to suppress contraband and other evidence seized pursuant to a judicial warrant au-

[1] The filing of a consolidated brief in these three closely related cases was authorized by Justice Rehnquist in an order dated August 29, 1983. The formal portions of this brief pertain to No. 82-1771, the case to which the United States is a party, and, unless otherwise indicated, references to the appendix to the petition and to the joint appendix are to the documents filed in that case.

thorizing the search of residences and automobiles belonging to them. Following an evidentiary hearing, the district court granted the motion to suppress in part, finding that the search warrant was not supported by probable cause (Pet. App. 10a).[2] The court of appeals affirmed the suppression order, with one judge dissenting (*id.* at 1a-6a).

a. The affidavit in support of the search warrant contained the following information. On August 18, 1981, a confidential informant of unproven reliability told Officer Cyril A. Rombach of the Burbank, California, Police Department that two persons known to him as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone (quaaludes) from their residence at 620 Price Drive in Burbank (J.A. 37). According to the informant, "Armando" sold cocaine in quantities of one-half pound and larger, and "Patsy" sold methaqualone in quantities of 100 tablets and larger (*ibid.*). The informant also stated that he had been present at the Price Drive residence five months earlier and had at that time seen "Patsy" sell 500 methaqualone tablets (*ibid.*). At the same time, the informant observed a shoe box containing between $50,000 and $100,000 that belonged to "Patsy." Finally, the informant stated that "Patsy" and "Armando" kept only relatively small quantities of drugs at the Price Drive residence, storing the remainder at another location somewhere in the "hill area" of Burbank (*ibid.*).

On receipt of this information, Burbank police officers instituted a month-long investigation that first focused on the Price Drive residence and later on

---

[2] Not all of the evidence was suppressed as to all of the respondents because the court held that no single respondent had a legitimate expectation of privacy in all of the places searched (Pet. App. 10a-13a; see also page 8 note 4, *infra*).

residences located at 716 South Sunset Canyon in Burbank and 7902 Via Magdelena in Los Angeles. On August 19, 1981, officers drove to the Price Drive residence and observed automobiles registered to respondents Armando Sanchez and Patsy Ann Stewart parked outside (J.A. 37-38). Although a records check revealed that Stewart had no prior criminal record, Sanchez had been found with $20,000 in currency at the Miami Airport in 1977, and had been arrested in Miami in December 1978 for possession of marijuana (J.A. 38).

On August 24, 1981, officers observed the arrival at the Price Drive residence of an automobile registered to respondent Del Castillo (J.A. 38). A Latin male exited the vehicle, entered the house, returned to the vehicle ten minutes later carrying a small paper bag and drove away. A background check disclosed that in January 1979 Del Castillo had been arrested in Miami for possession of 50 pounds of marijuana while he was attempting to board an aircraft bound for Los Angeles (J.A. 39). The telephone number for his employer that Del Castillo had given the probation authorities turned out to be registered to respondent Leon. Leon, in turn, had been arrested in 1980 on cocaine and quaalude charges and in 1979 on quaalude charges (*ibid.*). In addition, police officers were told by a woman, who previously had been arrested with Leon, that Leon was a drug importer affiliated with the "Cuban Mafia" (J.A. 39-40), and by a second informant that Leon had several thousand quaalude tablets at his residence (J.A. 40). Utility records showed that Leon lived at 716 South Sunset Canyon in Burbank (*ibid.*).

On August 25, 1981, officers observed Thomas Kilburn enter the Price Drive house and emerge a short while later carrying a paper bag (J.A. 40-41). The

officers determined that Kilburn had been arrested in 1974 for possession of hashhish and cultivation of marijuana (J.A. 41). On August 26, 1981, the officers observed an unidentified individual enter the Price Drive residence and emerge a short time later carrying a small box (*ibid.*).

On August 28, 1981, officers observed Del Castillo's vehicle being driven from Price Drive to a condominium at 7902 Via Magdelena. Later that day, Sanchez drove in his vehicle from Price Drive to Leon's Sunset Canyon residence, where Sanchez obtained a small package and returned to Price Drive. Later, an unidentified man drove to the Price Drive residence and entered the house. At about the same time, a man driving Del Castillo's vehicle arrived, ran into the residence, and ran back out immediately. Sanchez then left the Price Drive house, drove to a neighboring town, parked his car, and entered an unknown house. Before surveillance was lost, Sanchez was observed returning to his car with a large rectangular container (J.A. 42-43).

On September 8, 1981, officers were engaged in the surveillance of another house as part of a separate drug investigation. They observed Patsy Stewart drive up to the house. A female left the house and entered Stewart's vehicle. One minute later, she returned to the house carrying a small paper sack. Later that day, the occupants of that house were arrested for purchasing amphetamines from persons not related to this case (J.A. 43).

On September 11, 1981, the officers saw Sanchez and Stewart drive to the Los Angeles airport, where Sanchez, carrying only a small briefcase and a garment bag, boarded a flight for Miami (J.A. 44). Four days later, Stewart was driven to the airport in Del Castillo's automobile. Visibly upset when told that she could not carry a large suitcase on the plane

with her, Stewart checked the bag and boarded a flight for Miami (J.A. 46-47). Stewart and Sanchez both returned to Los Angeles on September 19, 1981. Although they had been seated together on the plane, Stewart and Sanchez deplaned and walked through the terminal separately; they rejoined one another only near the exit to the terminal. The pair carried many pieces of carry-on luggage, most of which they had not taken to Miami. And, although they had checked at least one piece of luggage in Miami, they did not pick up any checked luggage in Los Angeles. Nor did either of them have the large suitcase that Stewart had taken with her to Florida (J.A. 48-49). As they were entering a taxi, the two were approached by airport narcotics officers who conducted a consensual search of their luggage. A small amount of marijuana was found (J.A. 49).

In the early morning hours of September 19, 1981, the officers saw a silver Chevrolet that was registered to Sanchez parked in front of Leon's house on Sunset Canyon. The vehicle was later seen at the Price Drive residence (J.A. 49). The officers then went to 7902 Via Magdelena, where they observed the interior lights on. This was the first time since the beginning of the investigation that the officers had seen any sign of occupancy at the condominium.[3] Two days later, on September 21, Sanchez's automobile was observed parked outside the condominium (J.A. 50).

From these observations, Officer Rombach concluded that respondents were engaged in an on-going criminal enterprise involving the transportation and distribution of controlled substances (J.A. 52). Officer Rombach based his opinion both on personal

[3] Investigation showed that the utilities at the Via Magdelena condominium were listed in Stewart's name, but that there was no telephone service (J.A. 47).

experience as a narcotics officer and on specialized training in narcotics investigations (J.A. 50-52). In addition, Officer Rombach opined that the Via Magdelena condominium was being used as a "stash pad" to store large quantities of narcotics, which were then transported in smaller amounts to respondents' residences for distribution (J.A. 47-48). Officer Rombach averred that major drug dealers most often store large quantities of drugs at locations other than their primary residences to minimize the risk of seizure if their activities are detected (*ibid.*).

b. Based on this information, a state superior court judge issued a warrant on September 21, 1981, authorizing the search of the residences at 620 Price Drive and 716 South Sunset Canyon, the condominium at 7902 Via Magdelena, and automobiles registered to Sanchez, Stewart, Leon and Del Castillo (J.A. 31-33). In an ensuing series of searches, police officers seized more than four pounds of cocaine and 1,165 quaalude tablets at the Via Magdelena condominium, nearly a pound of cocaine at Leon's house on Sunset Canyon, and about an ounce of cocaine at the Price Drive residence of Stewart and Sanchez. The officers additionally found paraphernalia for testing, cutting and packaging cocaine, scales, a police radio and large amounts of currency (J.A. 53-69). Finally, a search of Stewart's automobile produced two garage door openers—one for the Price Drive residence and one for the Via Magdelena condominium—while a search of Del Castillo's automobile revealed a small amount of marijuana residue.

c. The district court suppressed the seized evidence, finding that there was "no question" that the reliability and credibility of the informant had not been established (Pet. App. 10a). Although recog-

nizing that "[s]ome details * * * tended to corroborate" the informant's information, the court concluded that such details either corroborated information about a stale transaction or were "as consistent with innocence as * * * with guilt" (*ibid.*). Accordingly, the court found that the search warrant was not supported by probable cause.[4]

The district court rejected the government's argument that the exclusionary rule should not apply when evidence is seized in reasonable, good-faith reliance on a search warrant (Pet. App. 14a). In so doing, however, the district court specifically noted (*ibid.*):

> I will say certainly in my view, there is not any question about good faith. He [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true.

d. On appeal, a panel of the Ninth Circuit affirmed the suppression order, with one judge dissenting. The

---

[4] The district court rejected respondents' additional claims that the description of the items to be seized in the search warrant was impermissibly overbroad and that the officers had failed to comply with the California "knock-notice" rule during the execution of the warrant (Pet. App. 9a-10a). Moreover, the court held that only Sanchez and Stewart had a sufficient expectation of privacy to challenge the search of the Price Drive residence; that only Leon had a sufficient expectation of privacy to challenge the search of the Sunset Canyon residence; and that only Stewart and Del Castillo had a sufficient expectation of privacy to challenge the searches of their respective automobiles (*id.* at 10a-13a). No one, in the district court's view, was entitled to challenge the search of the Via Magdelena condominium (*id.* at 11a).

majority held that the only portion of the affidavit that adequately set forth facts to demonstrate the informant's knowledge of criminal activity—the informant's personal observation of "Patsy's" distribution of drugs—was fatally stale (Pet. App. 3a). The majority further held that the information supplied by the informant was inadequate under both prongs of the *Aguilar-Spinelli* test [5] and that the month-long independent police investigation was insufficient either to corroborate the informant's information or to revive the stale information (Pet. App. 3a). Finally, the majority flatly declined to recognize a "good-faith" exception to the exclusionary rule (*id.* at 4a).

In dissent, Judge Kennedy observed that "[t]he affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith" (Pet. App. 5a). Judge Kennedy concluded that the informant's information was both adequately corroborated and sufficiently current in view of the month-long surveillance, which had revealed to experienced investigators a continuous pattern of conduct that "was quite inconsistent with any explanation other than illegal drug activity" (*ibid.*).

2. *No. 82-963*—On May 5, 1979, at approximately 5 a.m., the badly burned and beaten body of a 29-year old woman was found in a vacant lot in the Roxbury section of Boston (82-963 Pet. App. A3). Respondent was convicted of first-degree murder (*id.* at A1). On appeal, the Supreme Judicial Court of Massachusetts reversed respondent's conviction because certain evidence introduced at trial had been "obtained in the course of a police search conducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statu-

---

[5] *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964).

tory requirement that search warrants describe the things to be seized" (*ibid.*).

a. After the murder victim's body was discovered, suspicion quickly focused on respondent, a boyfriend of the victim (82-963 Pet. App. A4). Respondent voluntarily accompanied police officers to the station for questioning (*id.* at A4-A5). On the way to the station, respondent told police that he had last seen the victim some five days earlier, that on that day he had gone to her house, stayed there for about an hour, and then left with her in a cab (*id.* at A5). They stopped to purchase some marijuana and a bottle of amaretto (*id.* at A6). Respondent told police that the victim then left him at about 1 p.m. and that he had not seen her since (*ibid.*). At the police station, respondent told essentially the same story, adding that after purchasing the marijuana and the amaretto he and the victim had gone to respondent's home at 42 Deckard Street in Roxbury and that the victim stayed there until approximately 2 p.m. (*id.* at A6-A7). Respondent also told the police that he had spent the evening of May 4 and the early morning hours of May 5, when the victim's body was found, at a "gaming house" in Dorchester (*id.* at A8).

The police interviewed various persons who, according to respondent, had been at the "gaming house" when he was there. The police learned that at about 3 a.m. on May 5, respondent had borrowed a car for a trip that should have taken approximately 15 minutes, but that he did not return to the "gaming house" until approximately 4:45 a.m. He remained there for only a few minutes and then left again (82-963 Pet. App. A8).

Continuing their investigation on Sunday morning, May 6, 1979, police learned from a friend of respondent that the basement of the Deckard Street house had been refinished and that respondent had said he

entertained women there (82-963 Pet. App. A9). With the owner's consent, police then inspected the car that respondent had borrowed the previous night. They found bloodstains and pieces of hair on the rear bumper and near the lid of the trunk (*id.* at A10). Inside the car were various types of wire (*ibid.*).

Later on Sunday morning, the police and the district attorney concluded that they should seek a warrant for respondent's arrest and a warrant to search his residence at Deckard Street (82-963 Pet. App. A10). An application for a search warrant was prepared by one of the investigating officers, and both the district attorney and his first assistant concluded that it set forth probable cause for the arrest and the search (*id.* at A11). The application specified precisely those items for which permission to search would be sought (*id.* at A12 n.7):

> A fifth bottle of amaretto liquor, 2 nickel bags of marijuana, a woman's jacket that has been described as black-grey (charcoal), any possessions of Sandra D. Boulware, similar type wire and rope that match those in the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, men's or women's clothing that may have blood, gasoline burns on them. Items that may have fingerprints of the victim.

At this point, on Sunday afternoon, no court clerk could be found, nor could the police find a suitable search warrant form. The best they were able to locate was a form once used for searches for controlled substances in the Dorchester Division of the Municipal Court (82-963 Pet. App. A13). One of the officers attempted to modify this printed form by crossing out the words "controlled substance" on one side of the form and replacing the word "Dorchester" with "Roxbury" (*ibid.*). He also inserted "2nd & Base-

ment" of 42 Deckard Street as the places to be searched (*ibid.*) Despite these changes and additions, the references to "controlled substance" in those portions of the form that constituted the application for a search warrant and, when signed, would become the warrant itself, were not deleted (*id.* at A13-A14).

Several police officers and the first assistant district attorney then went to the home of a judge, arriving at approximately 2:45 p.m. on Sunday afternoon. The judge was unable to find a suitable search warrant form in his library, and so he used the "controlled substance" form as modified by the police and by himself. Again, however, no change was made to the substantive portion of the warrant. Thus, the warrant authorized the police "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance" (82-963 Pet. App. A15). The warrant did not refer to the items listed in the police officer's affidavit in support of the application, nor was the affidavit attached to the search warrant (*ibid.*).

One of the officers left with the warrant and his own affidavit in support thereof (82-963 Pet. App. A16). He thought the warrant was valid (*ibid.*). At about 5 p.m. on Sunday afternoon, he arrived at 42 Deckard Street to execute the warrant. He was admitted to the house by the respondent's mother and sister, neither of whom apparently asked to read the warrant (*id.* at A16-A17).

During the course of the search, the police found and seized apparently bloodstained boots, women's earrings, one apparently with bloodstains, an apparently bloodstained envelope, a pair of apparently bloody men's jockey shorts and women's leotards. The police also found bloodstains on the concrete floor of

the cellar that later were shown to match the victim's blood type (82-963 Pet. App. A17-A20). The Supreme Judicial Court of Massachusetts summed up the evidentiary significance of the search as follows (*id.* at A20-A21):

> It can readily be seen that evidence seized in the search of 42 Deckard Street tended to show that the [respondent] seriously injured the victim in his cellar, hid her earrings under a piece of plywood under a mat, and tied her up with wire available in the cellar of his home. This evidence, much of it obtained as a result of careful and commendable police investigatory techniques, was highly probative of the [respondent's] guilt. Although the Commonwealth could have presented a case against the [respondent] without this evidence, this evidence was most important in rounding out a case based only on circumstantial evidence.

b. The trial court denied respondent's motion to suppress the evidence seized at 42 Deckard Street (82-963 Pet. App. B1-B48). The court first held that the affidavit in support of the search warrant established probable cause to search the premises at 42 Deckard Street (*id.* at B26-B29). The court then held, however, that the warrant was "fatally defective" (*id.* at B34) because it did not incorporate by reference or have attached to it the application for the warrant, which, the court found, adequately specified the places to be searched and the items to be seized. Nevertheless, the trial judge concluded that the exclusionary rule should not be invoked because its deterrent effect would not be realized (*id.* at B42-B44):

> In this case the police sought a warrant. The affidavit was submitted to an official from the

> District Attorney's office for a determination as to its adequacy from the point of view of probable cause. There was proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search. The police had adequately described with constitutional specificity the places to be searched and the items to be seized. The police presented a form which was the only form of warrant available to them. The magistrate said he could adopt it. Thereafter the actual search undertaken was within the limit of the authority the police thought reasonably had been granted.
>
> * * * * *
>
> [I]f police officers undertake their duties properly, they will act in the same fashion in similar circumstances in the future and the only consequence of applying the exclusionary rule would be to keep from the jury probative evidence and thereby impair the truth finding function.

c. The Supreme Judicial Court of Massachusetts reversed (82-963 Pet. App. A30-A53). A plurality of the court first held that the warrant was defective for failing to specify the items to be seized (*id.* at A30-A34). After noting that few courts had addressed the applicability of the exclusionary rule to situations involving judicial error rather than police misconduct, the plurality opinion concluded that suppression was of dubious validity as a deterrent "in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct" (*id.* at A48-A49). Nevertheless, the plurality concluded that suppression was required in this case because this Court has not yet recognized an excep-

tion to the exclusionary rule for an error of the type that occurred here (*id.* at A49-A52).

Two justices concurred in the judgment because, in their view, the search warrant was so defective that neither the police nor the issuing judge could be said to have acted in reasonable good faith (82-963 Pet. App. A5-A12). The concurring justices also disagreed with the plurality on the efficacy of the exclusionary rule as a means for deterring judicial error (*id.* at A14).

Justice Lynch dissented. First, he noted that, the technical defect notwithstanding, the search warrant in this case posed none of the dangers of general warrants and that the police had in fact conducted the search as if the items to be seized had been specifically identified in the warrant (82-963 Pet. App. A2-A5). More importantly, the dissent concluded that application of the exclusionary rule in this case would "serve no beneficial purpose" (*id.* at A11):

> Police misconduct will not be deterred because none occurred. The human error committed by the judge harmed no rights of the defendant, as nothing beyond the evidence listed in the affidavit was searched for or seized. By contrast, application of the exclusionary rule will result in the very substantial harm of withdrawing highly probative evidence from the trier of fact.

Accordingly, the dissent concluded that this Court's exclusionary rule precedents did not mandate suppression in this case (*id.* at A12).

3. *No. 82-1711*—Respondent was convicted of second degree burglary. Following his conviction, the trial court granted his motion for a new trial and his motion to suppress evidence in light of an intervening decision of the Supreme Court of Colorado, *People* v. *Schreyer*, 640 P.2d 1147 (1982). On the State's

appeal, the state supreme court affirmed the suppression ruling, holding that the police lacked probable cause to arrest respondent and that evidence seized from respondent at the time of his arrest was therefore inadmissible at his burglary trial. The court also declined to recognize a "good faith" exception to the exclusionary rule because this Court has not yet done so (82-1711 Pet. App. 7); it further held that Colorado's statutory good faith exception (Colo. Rev. Stat. § 16-3-308 (Supp. 1982)) did not apply to this case.

a. On September 29, 1981, Darlene Bergan was outside her home in Denver sweeping the porch. She saw a man walking on the opposite side of the street and observed him briefly peering into the front window of the house across from hers. After observing him apparently looking into other windows at the same house, she saw him stop at another house, after which he disappeared from her view. She next saw him about an hour later at a bus stop next to her house. He had taken off his shirt and was using it to cover a television set. He appeared nervous to Mrs. Bergan, and she called the police (82-1711 Pet. App. 3).

Officer Freeman, a 21-year police veteran, was the first to respond to the dispatcher's report of a possible burglary suspect. He asked respondent for identification, but respondent had none. Other officers then arrived at the scene. They asked respondent various questions, to which he responded that he had bought the television set from someone in the neighborhood for $100 and was trying to take it home. He was wearing an undershirt and had brown wool gloves in his back pocket (82-1711 Pet. App. 4).

After Mrs. Bergan came outside and identified herself as the person who had called the police, respondent was arrested and searched (82-1711 Pet. App. 4).

Under his shirt, police found the television set and a video game. They also found $140 in cash, five rings (including two class rings bearing different initials and class years), and some women's jewelry in respondent's pockets (*id.* at 4-5).

Several hours after respondent was arrested, the owners of a house one block south of Mrs. Bergan's house reported that their house had been burglarized and that a television set and a video game had been stolen. The television set and video game that had been found in respondent's possession were later identified as the items taken in the burglary (82-1711 Pet. App. 5).

b. A majority of the state supreme court held that the officers lacked probable cause to arrest respondent because they did not learn until several hours after the arrest that a burglary had in fact been committed. As the majority explained (82-1711 Pet. App. 6-7):

> The arresting officer in this case believed that probable cause existed to arrest Quintero. At the time the arrest was made, the police knew that Quintero was a stranger to the neighborhood, and that he claimed that he had purchased a television set from someone in the neighborhood. They also knew that he had attempted to cover the television set and the video game with his shirt. He had no identification, but no evidence existed to establish that a crime had been committed. *Brown* v. *Texas*, 443 U.S. 47 * * * (1979). The police did not learn who the owners of the television set and the video game were until more than five hours after they arrested Quintero. Suspicion does not amount to probable cause and an analysis of the facts requires us to reach the

same conclusion which we reached in *People* v. *Schreyer*, 640 P.2d 1147 (Colo. 1982).

The majority also held that the lack of probable cause to arrest was not remedied by the inevitable discovery doctrine (not here in issue) or a good faith exception to the exclusionary rule. As for the latter, the majority held that it would be "inappropriate" for the state supreme court to adopt a good faith exception in the absence of action by this Court (82-1711 Pet. App. 7).

Finally, the majority concluded that Colo. Rev. Stat. § 16-3-308 (Supp. 1982), which renders admissible evidence seized as a result of a good faith mistake, was inapplicable here, holding that the statutory exception is limited to errors of fact rather than errors of law and concluding that the "mistake" in this case had been one of law in assessing the existence of probable cause to arrest (82-1711 Pet. App. 8).

Justice Rovira dissented, both on the question of probable cause to arrest and on the application of the exclusionary rule (82-1711 Pet. App. 10-17).

SUMMARY OF ARGUMENT

1. Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Instead, decisions of this Court over the last two decades have made it clear that the exclusionary rule first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1914), and later extended to the states in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), is a judicially-created remedy, the paramount and perhaps sole purpose of which is the deterrence of unlawful police conduct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969). As the deter-

rence rationale has achieved supremacy over earlier, now-discarded justifications for the rule, the Court has recognized that it makes sense to apply the rule only to those situations in which its deterrent purpose will in fact be significantly advanced. *Calandra*, 414 U.S. at 348. Accordingly, the Court now employs a cost-benefit analysis whenever it considers whether the rule should be applied to particular situations. When the costs of applying the rule are found to outweigh whatever deterrent effect it might achieve, the rule will not be imposed. See, *e.g.*, *United States* v. *Havens*, 446 U.S. 620 (1980); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Stone* v. *Powell*, 428 U.S. 465 (1976); *United States* v. *Janis*, 428 U.S. 433 (1976); *Calandra*, 414 U.S. 338; *Alderman* v. *United States*, 394 U.S. 165 (1969).

2. After nearly 70 years of experience with the exclusionary rule, it is now appropriate to apply the same type of cost-benefit analysis in considering whether to adopt a "reasonable mistake" exception to the existing rule. If, as we shall demonstrate in this brief, the benefits of applying the rule to certain classes of situations are outweighed by the costs, the Court should not hesitate to reformulate the rule. In our submission, a reasoned cost-benefit analysis of the exclusionary rule compels the conclusion that it should no longer be applied in those situations in which a reasonably well-trained police officer should not have known that the search and seizure in question violated the Fourth Amendment or in which the violation did not substantially affect the rights of the subject of the search. Preliminarily, however, we suggest that this is a situation ill-suited to a strictly even-handed weighing of costs and benefits. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner

from what we ordinarily demand of rules of evidence. Thus, its benefits should not simply be presumed; they must, instead, be convincingly demonstrated if they are to overcome the indisputable costs. Accordingly, the exclusionary rule cannot rationally be retained in those circumstances where it is thought simply that it *might* produce some benefit. Similarly, the rule should not be retained merely because it appears that no better deterrent to police misconduct currently exists; the rule must carry its own weight through demonstrable evidence that it operates in the manner intended.

a. The principal benefit claimed for the exclusionary rule is its deterrent effect. Unfortunately for the proponents of the rule, however, it has never been empirically proven that the exclusionary rule is an effective deterrent in the absolute sense, or even that it is a relatively more effective deterrent than alternative, less draconian, Fourth Amendment remedies. And even if one accepts the intuitively plausible but unproven assumption that the rule is capable of deterring police misconduct to some extent, it is readily apparent as a matter of logic that the deterrent potential of the rule is drastically reduced, if not wholly eliminated, when it is invoked to suppress evidence obtained by a reasonably well-trained police officer unaware that his conduct violated the Fourth Amendment.

The cases now before the Court demonstrate that in certain circumstances the rule is both inappropriate and ineffective as a deterrent device. In *Quintero*, the police could not reasonably be expected to have known that the state supreme court would later hold that they lacked probable cause to arrest as a burglary suspect a stranger to the neighborhood found attempting to hide a television set under his shirt, and

unable to produce any identification or satisfactorily answer routine questions. On the contrary, many reasonable people would surely have considered the police derelict in their duty had they failed to arrest Quintero on the spot. Application of the exclusionary rule in this case is thus ineffective, because of the greatly diminished potential for deterrence when the police conduct themselves in a manner they reasonably believe to be lawful, and inappropriate, because society has little interest in "deterring" the police from solving or preventing crime under circumstances in which the Fourth Amendment violation, if any, could not reasonably have been predicted.

Quintero thus demonstrates the need for a "reasonable mistake" modification to the exclusionary rule in the case of warrantless searches and seizures. *Sheppard* and *Leon*, on the other hand, present the Court with its first real opportunity to consider whether there is *any* justification for application of the exclusionary rule to situations involving judicial mistakes. The rule's purpose is to deter *police* misconduct, and *Leon* demonstrates that that purpose cannot be advanced when law enforcement officers have done exactly what is demanded of them by obtaining a judicial search warrant and acting according to its terms. It is irrational to assume that police officers can be meaningfully deterred from future "unlawful" conduct when, at the time of the conduct in question, they had the authorization of a warrant obtained in the reasonable belief that there existed probable cause for the search and seizure in question. As has been often noted, the suppression of evidence that occurs when a higher court overturns a magistrate's finding of probable cause does not involve any police misconduct that needs to be deterred; all that is involved is disagreement among judges about subtle and ever-

changing principles of law. There is no rational justification for applying the exclusionary rule to these situations, which bear not the slightest relationship to the egregious police misconduct for which the rule was first devised.

Finally, the type of error that occurred in *Sheppard* was, in the circumstances of the particular case, harmless beyond question. No doubt there are circumstances in which failure to specify the items to be seized *could* lead to serious Fourth Amendment abuses. But that is not what happened here. Instead, it is undisputed that there was probable cause for the search, that the judge thought he was authorizing the search that was properly described in the police application, and that the police conducted the search in exactly the same manner that they would have if their application had been attached to or incorporated by reference in the warrant. Under these circumstances, the harmless error rule is appropriately invoked to avoid the draconian consequences of suppression.

b. The presumed benefits of the exclusionary rule, which are substantially diluted if not entirely absent in cases like the instant ones, must be weighed against the rule's undeniable costs. Those costs are readily catalogued:

First, the exclusionary rule excludes from consideration at trial the very evidence that is most relevant and trustworthy. The resulting distortion of the truth-finding process of adversary adjudication requires justification of the highest order.

Second, when applied in circumstances in which significant deterrence of future misconduct is unlikely, the rule benefits only those who otherwise would be found guilty; it allows "[t]he criminal * * * to go free because the constable has blun-

dered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). The available data demonstrate that the rule, where invoked, has a substantial effect on the prosecution's ability to obtain convictions. Moreover, the effects of the rule are felt most heavily in drug cases involving defendants who, following dismissal of their narcotics charges because of the suppression of dispositive evidence, often go on to commit other crimes, frequently crimes of violence. The rule affords no remedy, however, for the innocent victims of unlawful police conduct, who are or should be the very persons most deserving of protection.

Third, and irrespective of the actual number of guilty defendants set free by virtue of the rule, its application necessarily exacts a high cost in diminished public respect for the judicial system. The public perception that there is something wrong with a system of criminal justice that frees guilty defendants on "technicalities" cannot lightly be ignored.

Fourth, and of particular relevance to the instant cases, the rule lacks the essential ingredient of proportionality when applied to marginal Fourth Amendment violations. It utterly fails to take into account the actual existence of police misconduct that is perceived as such by the public and that is within the core proscriptions intended by the Framers of the Fourth Amendment. Behavior that a reasonably well-trained officer could not be expected to have known violated the Fourth Amendment is subject to the same draconian "remedy" as the most flagrant abuse of police power.

Fifth, granting for purposes of argument the premise that application of the rule to conduct close to the often indistinct boundary between lawful and unlawful searches would meaningfully deter some

marginally improper police conduct (see *United States* v. *Johnson*, 457 U.S. 537, 560-561 (1982)), in this class of cases the rule is, almost by definition, as likely to deter proper as improper conduct. Thus, one of the gravest costs of relentless application of the rule to honest police mistakes is not merely that "the criminal * * * [shall] go free because the constable has blundered," but that the crime shall go undetected (or, worse, unprevented) because the exclusionary rule has deterred the officer from the *lawful* performance of his duties.

Sixth, the present rule substantially strains the judicial system by encouraging the filing of suppression motions irrespective of whether there is even the slightest evidence of serious police misconduct. The windfall benefits of the rule to the guilty defendant are so overwhelming as to completely negate the process of self-screening and evaluation on the part of criminal defense counsel. A country whose judicial system is as seriously overloaded as ours can ill-afford the continued application of a rule that fosters such vast amounts of make-work.

Finally, the rule actually diminishes the Fourth Amendment by making judges reluctant to condemn questionable practices because of the extreme consequences—total suppression of unquestionably relevant and frequently dispositive evidence and the release, unpunished, of a dangerous offender.

c. While the trilogy of cases now before the Court serves to demonstrate some of the varying situations in which a "reasonable mistake" exception to the exclusionary rule would be appropriate, many of the practical details relating to the operation of such an exception may be left to future cases and initial development by lower courts. For now, it is sufficient to note that the most commonly-voiced objections to a

reasonable mistake exception are lacking in substance. For example, it has been claimed that the proposed exception would "put a premium on police ignorance" because the incentive for thorough police training in the requirements of the Fourth Amendment now provided by the exclusionary rule would be lost. This objection is a palpable strawman. The reasonableness of a police officer's actions would be tested by the objective standard of what should be expected of the reasonably well-trained law enforcement official. Thus, a reasonable mistake exception would preserve every incentive for police departments to ensure that their officers remain current with the development of Fourth Amendment law.

Moreover, the objective nature of the inquiry will protect the judicial system against unduly burdensome and generally irrelevant inquiries into the subjective state of mind of a particular officer. In most cases, a court will need to determine only whether a reasonably well-trained officer should have known, in light of the extant principles of law, that his conduct was prohibited. The inquiry thus will not be markedly different from that required of a court in deciding a suppression motion.

It is also sometimes suggested that the exclusionary rule needs to be retained in its present form, or even expanded, so as not to "freeze" the development of Fourth Amendment law. Of course, it is not entirely clear that society is greatly benefitted by having courts continue to decide every question that inventive lawyers can devise, particularly when "the general principles applicable to claims of Fourth Amendment violations are well settled * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 757 (1979). But, in any event, there need be no serious concern that adoption of a reasonable mistake exception to the exclusionary rule

would bring a halt to the adjudication of substantive Fourth Amendment issues. Many unsettled questions of Fourth Amendment law are amenable to adjudication in suits for declaratory or injunctive relief or in damages actions against municipalities. In addition, as demonstrated by the number of nonmeritorious suppression motions currently filed, criminal defendants can be counted upon to assert every defense available to them. Because the substantial windfall of exclusion would remain available to those defendants who could show demonstrably unreasonable police conduct, it is unrealistic to assume that defendants with colorably meritorious claims of Fourth Amendment violations will lose their incentive to litigate (although we anticipate that there would be a considerable reduction in the number of frivolous claims).

There is, moreover, no jurisprudential impediment to a court's deciding a question of substantive Fourth Amendment law before determining the applicability in a particular case of a reasonable mistake exception to the exclusionary rule. Such a practice would be entirely consistent with the customary approach of deciding questions of rights first, and then turning to questions of remedies. Indeed, it is a common feature of current jurisprudence, with appellate courts first considering an appellant's claim of error and then determining whether the error was harmless. Accordingly, whether to assume the existence of a Fourth Amendment violation and decide only the question of reasonable mistake, or whether to decide the substantive question first, should be left to judicial discretion. It might well be appropriate for courts to decline to adjudicate nonrecurring fact-bound questions concerning the propriety of a particular search and seizure if application of a reasonable mistake exception would

be sufficient to dispose of the case. On the other hand, courts would remain free to decide significant unsettled questions of law or to adjudicate particularly problematic or recurring factual situations that give cause for concern.

Finally, it has been suggested that, whatever the flaws of the exclusionary rule, it must be retained because there is no adequate alternative. This is, we submit, insufficient justification for a rule that carries the heavy costs of the exclusionary rule in the class of cases here considered. Moreover, the continued existence of the rule may well operate to deter the development of more efficacious and less costly alternatives. Accordingly, the time has come for recognition by this Court that, in the category of cases here under consideration, the exclusionary rule is entirely unjustified, if not actually detrimental to the achievement of the goals of the Fourth Amendment.

ARGUMENT

I. AS A JUDICIALLY CREATED RULE OF EVIDENCE, THE EXCLUSIONARY RULE MAY APPROPRIATELY BE MODIFIED IN THE LIGHT OF EXPERIENCE

This Court first required the exclusion of evidence obtained in violation of the Fourth Amendment in *Weeks* v. *United States*, 232 U.S. 383 (1914), a case involving successive, warrantless searches by federal agents of an accused's home, which resulted in the seizure of letters and other personal documents. Later, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the Court extended the application of the Fourth Amendment exclusionary rule to the states in the context of a case involving a forcible, warrantless entry into a suspect's home that was followed by an exploratory search through personal papers and effects. Since that

time, however, the exclusionary rule has been increasingly criticized as "both conceptually sterile and practically ineffective in accomplishing its stated objective" of ensuring compliance with the Fourth Amendment by law enforcement officials. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). Accordingly, members of the Court have repeatedly urged a general reconsideration of the exclusionary rule and the situations in which it is applied. *Id.* at 415-416, 420-421; see also *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 9-22 (White, J., concurring); *Robbins* v. *California*, 453 U.S. 420, 437, 443-444 (1981) (Rehnquist, J., dissenting); *California* v. *Minjares*, 443 U.S. 916, 917 (1979) (Rehnquist, J., dissenting from denial of stay); *United States* v. *Ceccolini*, 435 U.S. 268, 283 (1978) (Burger, C.J., concurring); *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (Powell, J., concurring); *Stone* v. *Powell*, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); *id.* at 537-539 (White, J., dissenting); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 271 (1973) (Powell, J., concurring); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring).

The instant cases offer appropriate vehicles for such a reevaluation of the scope of the exclusionary rule. In *Leon*, the record establishes that the police officers obtained a search warrant after making a detailed submission to a state court judge based on both a tip and corroborating information obtained during a month-long investigation of the tip. Thereafter, the officers executed the warrant according to its terms. As was recognized by the district court and by Judge Kennedy in dissent, the officers "laid a meticulous trail" (Pet. App. 14a) by conducting their

investigation "with care, diligence, and good faith" (*id.* at 5a). Including the issuing judge, five judges have examined the officers' application for a warrant, and they have divided three to two on the existence of probable cause. Under such circumstances, it seems wholly unreasonable to suppose that the police can be deterred from making a similar "mistake" in the future.

In *Sheppard*, the officers relied on a search warrant that was without question supported by probable cause. Granting that the warrant was defective because it failed to specify the items to be seized, those items nevertheless were correctly identified in the police officer's application for the warrant. Moreover, there is no question that the issuing judge knew and approved of the precise scope of the search that the police intended to conduct, or that the search was in fact so confined. See 82-963 Pet. App. A10-A16. Thus, highly probative evidence was suppressed because exigent circumstances surrounding issuance of the warrant resulted in the incomplete adaptation of boilerplate language in a form warrant. The fundamental values that the Fourth Amendment protects were in no way compromised, while society's equally compelling interest in convicting the guilty was dealt a needless blow.

In *Quintero*, police officers responded to a citizen's report of a possible burglary. The police found the suspect, a stranger to the neighborhood, standing at a corner bus stop in his undershirt, having placed his shirt over a television set. The suspect had no identification and told the police that he had paid someone $100 for the television set. Later that day, residents of the neighborhood reported that their house had been burglarized, and they identified items recovered from the defendant as items that had been

taken from their home. See 82-1711 Pet. App. 2-5. The Supreme Court of Colorado held that the police lacked probable cause to arrest respondent, although the majority apparently believed that probable cause would have been present if the police had had in their possession one additional fact—actual knowledge that a burglary had been committed. In our view, it is readily apparent that many reasonable persons would consider the police to have been derelict in their duty had they failed to arrest respondent simply because the victims of the burglary had not yet discovered what was obvious to the police—that a thief had made off with their property. But even assuming that the state court correctly determined the probable cause issue, it is unrealistic to suppose that the court's decision provides a useful guide to future police conduct. Cases such as *Quintero* highlight the impossibility of reliably providing precise guidance to the officer in the field confronted with a close probable cause issue; while an officer with an encyclopedic memory for the details of vast numbers of judicial decisions will, should he ever happen upon *precisely* the same facts, know that an appellate court has found them lacking, even the slightest variation in the facts could lead to a different result that the officer could not be expected to glean from decisions such as that in this case. Under such circumstances, the principal "lesson" learned by the police is that appellate oversight of the factual determinations that an officer must make in the daily performance of his duty offers an uncertain and basically unpredictable guide to future conduct.

Thus, in each of the cases now before the Court, the officers' conduct stands on a far different footing from the palpably unlawful searches at issue in *Weeks* and *Mapp*. The suppression remedy does not mean-

ingfully protect against the arbitrary invasion of privacy interests—the core value safeguarded by the Fourth Amendment—when, as in the instant cases, law enforcement officers have acted in the reasonable belief that their conduct complies with constitutional standards. Modification of the exclusionary rule to acknowledge this point is consistent with the fundamental purpose of the rule and the cases of this Court explicating it.

A. The Only Viable Justification For The Exclusionary Rule Is Its Presumed Deterrent Effect On Unlawful Police Conduct

Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. Although the plurality opinion in *Mapp*, 367 U.S. at 649, 651, 655-656, suggested that an absolute exclusionary rule is constitutionally required, the Court has never so held. Nevertheless, because the exclusionary rule was first conceived in the context of flagrantly unlawful police conduct and later extended to the states in a case involving even more abusive practices, it is not surprising that, for many years, the Court appeared to assume that the Fourth Amendment required an absolute prohibition against the use of illegally obtained evidence. As the Court has come to focus more clearly on the true purpose of the exclusionary rule and the effect it is likely to have in differing contexts, however, it has recognized that the rule is merely a judge-made rule of evidence—constitutionally based but not specifically constitutionally required—the contours of which must be adapted to fit the circumstances. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 348 (1974); *Desist* v. *United States*, 394 U.S. 244, 254

n.24 (1969); see also *Stone* v. *Powell*, 428 U.S. at 542 (White, J., dissenting); *Wolf* v. *Colorado*, 338 U.S. 25, 39-40 (1949) (Black, J., concurring) (rule "is a judicially created rule of evidence").[6]

Accordingly, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U.S. at 486. Because of the inherent trustworthiness of seized tangible evidence and the resulting societal costs from its loss through suppression, application of the exclusionary rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. Thus, any consideration of the extent to which the rule should be modified must begin with a clear understanding of its purpose.

Over time, the justifications advanced in support of the exclusionary rule have varied, but it is now clear that the principal, and certainly the only logical purpose of the rule is to deter Fourth Amendment violations by law enforcement officers by removing the incentive to commit those violations. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 486; *United States* v. *Janis*, 428 U.S. 433, 446 (1976). The Court summarized the rule's deterrent purpose succinctly in *Elkins* v. *United States*, 364 U.S. 206, 217 (1960):

> The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively

[6] As one commentator put it, "the exclusionary rule does not 'look' like a constitutional doctrine. * * * [It] is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1030 (1974).

available way—by removing the incentive to disregard it.

The rise to preeminence of the exclusionary rule's deterrent purpose reflects the abandonment of earlier justifications. Initially, the rule was justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy. *Weeks*, 232 U.S. at 398. This rationale has since been repeatedly and squarely rejected by the Court (*e.g.*, *Calandra*, 414 U.S. at 347; *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965)), and with ample reason. The exclusionary rule is fundamentally irrational as a remedy for unlawful invasions of privacy, both because it utterly fails to succor those most deserving of a remedy—the innocent victims of unreasonable searches—and because, as Judge Friendly has said in an observation particularly apt in cases like these of marginal illegality, "the benefit received [exclusion of evidence proving the defendant's guilt] is wholly disproportionate to the wrong suffered." Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 951 (1965).

Another early rationale for the exclusionary rule was that it served to safeguard the purity of the courts' processes by forbidding the introduction of tainted evidence. See *Elkins*, 364 U.S. at 222-223. But the "imperative of judicial integrity" has not in fact served as the basis for deciding cases. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 669 (1970). The Court has recognized that the strength of this rationale has been steadily eroded by a series of decisions permitting the collateral use of unlawfully seized evidence. See pages 34-38, *infra*. Thus, preserving the courts' distance from tainted evidence has now been eclipsed by, and indeed subsumed within, the policy of deter-

rence: to the extent that the judicial integrity rationale was intended to insulate the courts from becoming partners in lawless government conduct, that function is fully served by the policy of deterrence. See *Janis*, 428 U.S. at 458-459 n.35; *Stone* v. *Powell*, 428 U.S. at 484-485; *United States* v. *Peltier*, 422 U.S. 531, 536-538 (1975).

But even if the "imperative of judicial integrity" had survived as an independent justification for the exclusionary rule, it would not be impugned by the "reasonable mistake" exception that we propose (see pages 44-45, 47-49, 65-68, *infra*). As the Court recognized in *Peltier*, 422 U.S. at 537-538, "the 'imperative of judicial integrity' is * * * not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." Indeed, we suggest that judicial integrity is put in greater jeopardy by the rendition of erroneous verdicts caused by the suppression of dispositive evidence than it is by the admission of evidence that a reasonably well-trained police officer could not have been expected to know was being obtained in violation of the Fourth Amendment.

B. The Policy Of Deterrence Dictates A Cost-Benefit Approach To The Application Of The Exclusionary Rule

Recognition that the policy of deterrence is the only logical justification for the exclusionary rule has governed the Court's consideration of a multitude of applications of the rule. Because "the exclusion of evidence is not a personal constitutional right but a remedy," the judiciary "must be sensitive to the costs and benefits of its imposition." *Gates*, slip op. 11-12

(White, J., concurring). Indeed, this Court has long engaged in a cost-benefit analysis when it has confronted suggested expansions of the rule or has examined afresh the propriety of certain applications of the rule. For example, in *Alderman* v. *United States*, 394 U.S. 165, 174-175 (1969), the Court ruled that suppression may be sought only by one whose own Fourth Amendment rights have been violated. The Court concluded that any additional benefits that might flow from extending the suppression remedy to persons not themselves the victims of unlawful searches and seizures were offset by "the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Id.* at 175. See also *United States* v. *Salvucci*, 448 U.S. 83, 94-95 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980); *United States* v. *Payner*, 447 U.S. 727, 731-734 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 137 (1978).[7]

Similarly, the Court's recognition of the permissible use of unlawfully seized evidence as an impeachment tool rests on the conclusion that any furthering of the deterrent purpose of the exclusionary rule would be more than offset by the interference with the truth-finding function of criminal trials. See *United States* v. *Havens*, 446 U.S. 620 (1980); *Walder* v. *United States*, 347 U.S. 62 (1954); see also *Oregon* v. *Hass*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971). In reaching this conclusion, the Court

[7] These decisions would not be sustainable if the "imperative of judicial integrity" were a substantial independent basis for the exclusion of illegally obtained evidence, because the impact on judicial integrity of such use does not depend in the least upon whether the particular defendant's rights were infringed in procuring the tainted evidence.

noted in *Havens* that any increase in deterrence occasioned "by forbidding impeachment of the defendant who testifies [is] deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial" (446 U.S. at 627).

Likewise, the Court has refused to apply the exclusionary rule when the initial illegality has become attenuated. *E.g., United States* v. *Ceccolini*, 435 U.S. at 280. Again, a cost-benefit analysis controlled the outcome of the case (*ibid.*):

> The cost of permanently silencing [a live witness] is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect.

The Court also has employed a cost-benefit analysis in determining whether to apply the exclusionary rule to various types of proceedings other than the criminal trial itself. In *Calandra*, the Court refused to prohibit the use of illegally seized evidence in grand jury proceedings. In reaching this result, the Court stated (414 U.S. at 351-352; footnote omitted):

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. * * * We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.

A like analysis was employed in *Stone* v. *Powell*, 428 U.S. at 482-495, where the Court held that the substantial costs to society of the suppression remedy would outweigh any marginal deterrent effect that might follow from permitting state prisoners to re-

litigate search and seizure claims in federal habeas corpus proceedings. And in *Janis*, 428 U.S. at 454, the Court concluded that "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion."

Finally, the Court has employed the same balancing analysis when considering whether Fourth Amendment decisions should be applied retroactively. See, *e.g.*, *Peltier*, 422 U.S. at 538-539; *Williams* v. *United States*, 401 U.S. 646, 654-655 (1971) (plurality opinion); *Desist* v. *United States*, 394 U.S. at 249-250; *Linkletter* v. *Walker*, 381 U.S. at 636-639.[8] In these cases, the Court has recognized that retroactive application of new Fourth Amendment standards cannot meaningfully promote the deterrent purpose of the exclusionary rule.

In short, the Court has steadfastly declined to apply the exclusionary rule in circumstances in which the degree of incremental deterrence that suppression might provide is outweighed by the attendant societal costs.[9] This cost-benefit approach is a necessary corol-

---

[8] To the extent that *United States* v. *Johnson*, 457 U.S. 537 (1982), may be read as a departure from these cases, we suggest that it reflects only the Court's concern with according fundamental fairness for persons similarly situated rather than any general retreat from the balancing analysis that the Court has consistently employed in the context of the exclusionary rule.

[9] Using the same reasoning, lower federal courts have placed similar limitations on the application of the exclusionary rule. See, *e.g.*, *Donovan* v. *Federal Clearing Die Casting Co.*, 695 F.2d 1020 (7th Cir. 1982) (exclusionary rule inapplicable to evidence seized by Occupational Safety and Health Administration pursuant to subsequently-invalidated search warrant);

lary to the fact that deterrence is the only logical justification for the rule.

II. THE COSTS OF THE EXCLUSIONARY RULE OUTWEIGH ITS BENEFITS WHEN IT IS APPLIED TO SUPPRESS EVIDENCE OBTAINED IN A SEARCH AND SEIZURE THAT A REASONABLY WELL-TRAINED OFFICER WOULD NOT HAVE RECOGNIZED AS A VIOLATION OF THE FOURTH AMENDMENT

After nearly 70 years of experience with the exclusionary rule, it is now appropriate for the Court to employ the same type of cost-benefit analysis utilized in the past in evaluating particular applications of the rule (see pages 34-38, *supra*) to a consideration of the wisdom of its application to reasonable mistakes. Preliminarily, however, we suggest that this weighing is not properly performed on scales that are evenly balanced. By excluding unquestionably reliable and relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we gen-

---

Tirado v. *Commissioner*, 689 F.2d 307 (2d Cir. 1982) (evidence unlawfully seized by federal narcotics agents admissible in a federal civil tax proceeding; unlikely that narcotics agents would be deterred by prospect that illegally seized evidence might be unavailable in a future tax proceeding); *United States* v. *Lee*, 540 F.2d 1205, 1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976) (exclusionary rule inapplicable to sentencing proceedings); *United States* v. *Schipani*, 435 F.2d 26, 28 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (same); *United States* v. *Bazzano*, No. 81-1936 (3d Cir. June 17, 1983) (en banc) (exclusionary rule inapplicable at probation revocation hearings); *United States* v. *Winsett*, 518 F.2d 51, 53-55 (9th Cir. 1975) (same); *United States* v. *Hill*, 447 F.2d 817, 818-819 (7th Cir. 1971) (same); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161, 1163-1164 (2d Cir. 1970) (same). But see *Lopez-Mendoza* v. *Immigration and Naturalization Service*, 705 F.2d 1059 (9th Cir. 1983) (en banc) (exclusionary rule applicable in civil deportation proceedings).

erally demand of other rules of evidence. See, *e.g.*, C. McCormick, *Handbook of the Law of Evidence* § 72 (E. Cleary ed. 1972). Thus, the rule's benefits should not simply be presumed; the rule's application to particular classes of cases requires more than an assumption that it *might* have the desired deterrent effect. As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 499-500:

> To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention * * * to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. * * * The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

Similarly, Justice White stated in his *Gates* concurrence (slip op. 12):

> [A]ny rule of evidence that denies the jury access to clearly probative and reliable evidence must bear a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness.

See also Wilkey, *The Exclusionary Rule: Costs and Viable Alternatives*, 1 Crim. Just. Ethics 16, 20 (1982). In any event, as we shall now demonstrate, such an analysis reveals that the costs of the rule far outweigh its presumed benefits when applied to police actions that may in retrospect be deemed illegal but would not have been recognizable as such to a reasonably well-trained officer. Accordingly, the Court should have no hesitation in fashioning an appropriate exception to the rule.

A. The Presumed Benefits Of The Exclusionary Rule Are Not Realized By Applying It To Suppress Evidence Obtained In Searches Or Seizures That Were Not Recognizably Violative Of The Fourth Amendment

1. The principal benefit claimed for the exclusionary rule is its deterrent effect. Unfortunately for the rule's proponents, however, its deterrent effect has never been proven, either in an absolute sense or relative to alternative, less costly means of enforcing the Fourth Amendment. The Court itself has acknowledged the lack of reliable empirical evidence to support the deterrent effect of the exclusionary rule. In *Wolf* v. *Colorado*, 338 U.S. 25, 44 n.5 (1949) (Murphy, J., dissenting), Justice Murphy argued that his own "statistical study" of police chiefs supported a broadened application of the rule.[10] Several years later, however, the Court observed that "[t]here is no reliable evidence known to us that inhabitants of those states which exclude the [tainted] evidence suffer less from lawless searches and seizures than those of states that admit it." *Irvine* v. *California*, 347 U.S. 128, 136 (1954). See also *Elkins*, 364 U.S. at 218 ("it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule").

Since *Mapp*, of course, there have been no meaningful comparative statistics showing the effect the exclusionary rule has had upon police conduct. See *Janis*,

---

[10] Justice Murphy's study consisted of 26 replies to a questionnaire he himself sent to the police chiefs of 38 large cities. Only those replies "of any significance" were discussed in the text of his dissenting opinion (338 U.S. at 44 n.5). However commendable Justice Murphy's attempt to gather empirical evidence may have been, he himself recognized the need for more comprehensive research (*ibid.*).

428 U.S. at 452 & n.24. The Court has noted twice in recent years that the available empirical studies are virtually useless. *Stone* v. *Powell*, 428 U.S. at 492 & n.32; *id.* at 498-499 (Burger, C.J., concurring); *Janis*, 428 U.S. at 449-453. This situation is not surprising in view of the manifest difficulty of designing and implementing an adequately controlled comparative study that could produce objectively valid results.

The commentators, like this Court, have concluded that there is no reliable evidence to support the proposition that the exclusionary rule operates effectively to deter police misconduct. The author of the leading empirical study on the question has concluded (Oaks, *supra*, 37 U. Chi. L. Rev. at 755):

> As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective.

Thus, the rule cannot be reliably shown to fulfill the only purpose that justifies its implementation. Nevertheless, we accept as intuitively plausible (even if not empirically demonstrated) the premise that suppression of evidence in a criminal trial can to some extent or in some circumstances deter law enforcement officers from violations of the Fourth Amendment. What is pertinent to the present inquiry is how well, if at all, deterrence can operate in the "reasonable mis-

take" context. It seems apparent that the degree of deterrence achieved by the exclusionary rule is likely to vary in relation to two factors: the extent to which imposition of the suppression sanction is "painful," and the extent to which the officer can predict at the time he acts that his action is improper and therefore likely to lead to imposition of the sanction. Cases such as *Calandra*, *Stone* v. *Powell*, *Janis*, and *Havens* turn upon the Court's assessment of the first of these factors; they reach the result they do because it appeared unlikely to the Court that police officers would be encouraged to engage in prohibited conduct by the availability of the particular uses of unlawfully seized evidence there permitted. Thus, any speculative deterrent effect was clearly outweighed by the evident costs of suppression.

The present cases call upon the Court to evaluate the second factor, *i.e.*, whether deterrence will be too slight to justify the costs of suppression when the conduct in question is of a sort that a reasonably well-trained officer would not recognize to be unlawful. In advancing the contention that exclusion of evidence is unjustified in such circumstances, we do not (and need not) go so far as to suggest that adoption of a reasonable mistake exception would have no effect at all on the presumed deterability of Fourth Amendment violations. Perhaps it is tenable to suppose that, if police are responsive to the suppression sanction, then the more sweeping and stringent the use of the sanction, the more cautious they will be in cases in which there is any room for doubt about the legality of a proposed search or seizure, a point the Court made in *United States* v. *Johnson*, 457 U.S. at 560-561.

But the mere fact that some deterrence may be postulated plainly cannot control the inquiry here. If

it did, the Court's decisions imposing the "standing" requirement, for example, would be totally untenable; it is, after all, hardly disputable that a rule allowing *any* defendant to obtain suppression would be far more likely to deter than one excluding the fruits of searches that were not recognizably illegal at the time they were undertaken. The question, in short, does not turn merely upon identification of some reasonable possibility of deterrence, but requires an evaluation of the substantiality of the anticipated deterrence. As the Court noted in *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974):

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in good faith, however, the deterrence rationale loses much of its force.

Similarly, in *Peltier*, 422 U.S. at 542, the Court stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

See also *Janis*, 428 U.S. at 458-459 n.35; *United States* v. *Mahoney*, No. 82-1452 (5th Cir. Aug. 22, 1983), slip op. 6707 ("[T]here may be benefit in uniformly applying the exclusionary rule such that legal-

ity is the sole index of exclusion. Those benefits bear in our view too great a price").

2. Experience teaches that Fourth Amendment violations vary greatly in their gravity and, we submit, in their amenability to deterrence. At one end of the spectrum, when officers have made Fourth Amendment intrusions under circumstances "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," or engaged in law enforcement activities that constitute "flagrantly abusive violation[s] of Fourth Amendment rights," "the deterrent value of the exclusionary rule is most likely to be effective." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring).[11] By contrast, when there is merely a "tech-

[11] "[T]he object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause." H. Friendly, *Benchmarks* 261 (1967) (footnote omitted). See also Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, 744-745 (1972).

In accord with that sentiment, the ALI's *Model Code of Pre-Arraignment Procedure* § SS 290.2(2) (1975), provides that "[a] motion to suppress evidence * * * shall be granted only if * * * the violation upon which it is based was substantial * * *." In turn, the substantiality of a violation is to be determined from a consideration of "all the circumstances" of a case (*id.* § SS 290.2(4)), except in those situations where a violation is "gross, wilful and prejudicial to the accused" or "appears to be part of the practice of the law enforcement agency" (*id.* § SS 290.2(3)). As one commentator has stated, "the purpose of the test is to invite courts to reconsider the need for exclusion where the fourth amendment violation is relatively minor and is neither willful nor reflective of agency policy or general indifference to individuals' rights." Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1423 (1981) (footnote omitted).

nical" violation of Fourth Amendment rights occasioned by actions that a reasonably well-trained police officer would not recognize as impermissible, "the deterrence rationale of the exclusionary rule does not obtain," and there is accordingly "no legitimate justification for depriving the prosecution of reliable and probative evidence." *Id.* at 611-612.

In our view, if the exclusionary rule is to function tolerably in our society, it must take account of these differences. Thus, we endorse Justice White's opinion (*Stone* v. *Powell*, 428 U.S. at 538 (White, J., dissenting)) that

> the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. These are recurring situations; and recurringly evidence is excluded without any realistic expectation that its exclusion will contribute in the slightest to the purposes of the rule, even though the trial will be seriously affected or the indictment dismissed.

See also *Gates*, slip op. 1, 12 (White, J., concurring).

This type of focused exception responsive to the policies of the exclusionary rule has been expressly adopted by the Fifth Circuit. *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981). There, a federal agent who had previously arrested Williams in Ohio for a narcotics violation encountered her in Georgia. The agent knew that a condition of Williams' release on bond pending appeal was that she remain in Ohio. Accordingly, the agent arrested Williams for violating this condition and, in ensuing searches incident to the arrest, seized heroin from Williams' possession.

Sitting en banc, the Fifth Circuit held unanimously that the district court should not have suppressed the heroin. One majority of the court held that the federal agent had legal authority to arrest Williams because, by violating the conditions of her bail release, she had committed the crime of contempt of court in the agent's presence (622 F.2d at 836-839). A different, overlapping majority of the court held that, irrespective of the validity of Williams' arrest, the heroin should not have been suppressed because the agent had acted in good faith in arresting and searching Williams, and could not reasonably be expected to have known that there was serious doubt concerning his authority to make the arrest. Because the purpose of the exclusionary rule is to deter "willful or flagrant actions by police, not reasonable, good-faith ones" (*id.* at 840), the court concluded that it made no sense to suppress evidence in these circumstances, "unless we somehow wish to deter [police officers] from acting at all" (*id.* at 842). The court noted that its decision was fully consistent with this Court's cost-benefit approach to the exclusionary rule (*id.* at 842-843; citations omitted; emphasis added):

> Any slight deterrent effect of excluding fruits of good-faith arrests is *even less* than the small deterrence from suppressing the fruits of illegal police actions that are attenuated in effect, that are challenged in habeas corpus petitions on fourth amendment grounds, that are used in grand jury deliberations, or that are used for impeachment. Yet the Supreme Court has found that the deterrent effect of exclusion in the examples listed and others does not justify the societal harm incurred by suppessing relevant and incriminating evidence. The good-faith exception

that we explicitly recognize today is of a kind with these.[12]

3. The "reasonable mistake" exception to the exclusionary rule that we advocate will be appropriate

---

[12] The Fifth Circuit has recently applied the *Williams* rule in *United States* v. *Mahoney*, No. 82-1452 (Aug. 22, 1983). Other courts have adopted similar rules. See *United States* v. *Ajlouny*, 629 F.2d 830, 840-841 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (even if warrantless national security wiretap was unlawful, suppression not required where agents acted in good faith and could not be charged with knowledge that their conduct was improper); *United States* v. *Nolan*, 530 F. Supp. 386, 396-399 (W.D. Pa. 1981) (suppression not required for what was, at most, a technical, good faith violation of the knock-and-announce rule); *United States* v. *Wilson*, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (even if arrest effectuated outside of officers' territorial jurisdiction was not a lawful citizen's arrest, good faith exception bars suppression of marijuana); *Gifford* v. *State*, 630 S.W.2d 387, 391 (Tex. Crim. App. 1982) (suppression not required where officers relied in good faith on a search warrant later found to be technically defective); *People* v. *Adams*, 53 N.Y.2d 1, 9-10, 422 N.E.2d 537, 541, 439 N.Y.S.2d 877, 881-882 (1981) (suppression not required where agent relied in reasonable good faith on purported authority of accused's girlfriend to consent to a search of his apartment); cf. cases cited at pages 37-38 note 9, *supra*.

A number of legal commentators have joined the Fifth Circuit and other courts following its lead in noting the absence of any meaningful deterrent effect when police officers have acted in the reasonable belief that their conduct was lawful. See, *e.g.*, Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 37-38 (1982); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1380 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 650 (1978); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1044 (1974).

in a variety of factual settings, not all of which can or should be precisely mapped out at this stage of the development of the exception. But the facts in *United States* v. *Williams* and in *Quintero* well illustrate two situations in which the exclusionary rule should be modified to accommodate the practical realities of police work. In *Williams*, the officer was required to make an on-the-spot decision concerning the scope of his arrest powers, a legal issue that had not been judicially resolved. Irrespective of what an appellate court might ultimately announce as the correct answer to that legal question, there can be no doubt that the officer was not unreasonable in believing that he had observed the commission of a crime in his presence. Society expects the police to act in such situations, and it cannot seriously be urged that society is benefitted, or that individual constitutional liberties are meaningfully advanced, by a rule of law that causes an officer to doubt the propriety of taking action when he observes what he reasonably believes to be an offense in progress.

Similarly, in *Quintero*, the court found that the arresting officer believed he had probable cause to arrest the respondent (82-1711 Pet. App. 6); indeed, it is difficult to imagine that the officer could have believed anything else. But regardless of the "correct" answer to the probable cause issue,[13] the officer was called

---

[13] In our view, it is clear that the Supreme Court of Colorado misread *Brown* v. *Texas*, 443 U.S. 47 (1979). In *Brown*, the Court held that the police had unlawfully detained Brown "[i]n the absence of any basis for suspecting [him] of misconduct" (*id.* at 52). Brown had merely refused to identify himself when stopped in an area frequented by drug traffickers; the police could articulate no objective facts suggesting that Brown was himself engaged in drug dealings or in any other criminal activity (*id.* at 49, 52). In *Quintero*, by contrast, the arresting officer did articulate (and the state supreme

upon to make an immediate judgment involving a mixed question of law and fact as to which, at minimum, reasonable persons could differ. Again, society is not benefitted by a rule of law that seeks to "deter" law enforcement officers who reasonably believe that a crime has been committed from performing their duty to make an arrest.

As the cases now before the Court demonstrate, policemen are not trained legal technicians; nevertheless, they are expected to make quick decisions, often involving complicated legal and factual analyses, "in the course of the difficult and often dangerous business of law enforcement." Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 Tex. L. Rev. 736, 741 (1972). Thus, countless officers in the field must daily decide under rapidly-changing circumstances whether there exists the requisite probable cause to support an arrest or a search, reasonable suspicion to justify an investigative detention, or exigent circumstances permitting warrantless action. In such cases, "[i]nadvertent errors of judgment" and "honest mistakes" will "inevitably occur given the pressures inherent in police work having to do with serious crimes." *Bivens*, 403 U.S. at 418 (Burger, C.J., dissenting).

The uncertainties inherent in police work are exacerbated by a lack of coherent Fourth Amendment standards that are readily recognizable and can be predictably applied by officers in the field. Too often, courts leave police officers to resolve these difficult questions for themselves, see *New York* v. *Belton*, 453

---

court recited) the objective factors that led him to conclude that respondent had committed a burglary (82-1711 Pet. App. 3-7). Nevertheless, for purposes of this case, we must assume that the state supreme court correctly determined the probable cause issue.

U.S. 454, 470 (1981) (Brennan, J., dissenting), and then feel free to second-guess what appeared at the time to have been reasonable judgments. The result is that the courts have engendered a "state of uncertainty" that is "intolerable" to the officer on the beat. *Coolidge* v. *New Hampshire*, 403 U.S. at 490-491 (Harlan, J., concurring).[14] Without the ability accurately to predict how courts will resolve Fourth Amendment questions, law enforcement officers will neither know the scope of their authority nor be sufficiently deterred from improper action to justify application of the exclusionary rule. See *New York* v. *Belton*, 453 U.S. at 459-460; see also LaFave, *Improving Police Performance Through the Exclusionary Rule*, 30 Mo. L. Rev. 391, 395 (1965).[15]

---

[14] As Justice Frankfurter once remarked, "the course of true law pertaining to searches and seizures * * * has not—to put it mildly—run smooth." *Chapman* v. *United States*, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). See also *Cady* v. *Dombrowski*, 413 U.S. 433, 440 (1973) ("this branch of the law is something less than a seamless web"). Legal commentators have agreed with these observations. See, *e.g.*, Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) ("For clarity and consistency, the law of the fourth amendment is not the Supreme Court's most successful product"); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1033 (1974) (Fourth Amendment law "is so complicated and abstruse that the police often honestly and reasonably cannot determine in advance" how it will be applied); Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L.J. 1065, 1092 (1982) (Fourth Amendment law marked by "sophisticated, complicated, and confusing decisions").

[15] As Professor LaFave has noted, "[t]he threat of evidence exclusion can have little impact unless decision-making officers have some basis for determining what conduct will bring about exclusion" (30 Mo. L. Rev. at 396).

There is no basis for faulting an officer who has made a reasonable but incorrect assessment regarding the existence of reasonable suspicion or probable cause or the necessity of obtaining a warrant. Fourth Amendment adjudications inevitably leave "much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest." *Stone* v. *Powell*, 428 U.S. at 540 (White, J., dissenting).[16] Justice White went on to note (*id.* at 539-540):

> [E]xperience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men

[16] And, of course, the instances are legion in which lower courts have *erroneously* condemned officers' actions as violative of the Fourth Amendment. Indeed, last Term alone this Court reversed seven lower court decisions that had invalidated searches or seizures on Fourth Amendment grounds. *Michigan* v. *Long*, No. 82-256 (July 6, 1983); *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983); *Illinois* v. *Lafayette*, No. 81-1859 (June 20, 1983); *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983); *Illinois* v. *Gates*, No. 81-430 (June 8, 1983); *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983); *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983). See also *New York* v. *Belton*, 453 U.S. 454 (1981); *United States* v. *Cortez*, 449 U.S. 411 (1981); *Colorado* v. *Bannister*, 449 U.S. 1 (1980); *United States* v. *Ramsey*, 431 U.S. 606 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Watson*, 423 U.S. 411 (1976); *Texas* v. *White*, 423 U.S. 67 (1975). Because courts are fallible human institutions, occasional mistakes are unavoidable, especially when the legal issue is close. What is unfortunate, however, is that it should frequently happen that *lawfully* seized evidence is suppressed. The rule for which we contend will greatly diminish that risk.

could easily differ on the question. It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that there was not probable cause to make the arrest and to seize the evidence offered by the prosecution. * * *

In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty.[17]

---

[17] Lower court judges have made the same point. *E.g.*, *Government of the Virgin Islands* v. *Rasool*, 657 F.2d 582, 595 (3d Cir. 1981) (Adams, J., concurring):

> [I]t is not realistic to expect the exclusionary rule to deter misconduct on the part of police officers. Often there is no misconduct to deter or punish—the officer has simply acted reasonably in a pressured situation and is later told he guessed wrong about how Supreme Court precedents might be interpreted to apply in fine-line situations.

In a similar vein is *United States* v. *Ross*, 655 F.2d 1159, 1204 (D.C. Cir. 1981) (en banc) (footnote omitted) (Wilkey, J., dissenting), rev'd, 456 U.S. 798 (1982):

> [T]oo many prosecutions * * * have gone awry, not as a result of intentional police misconduct, and certainly not because of any doubt about the guilt of the criminal, but simply because a court, with the benefit of time to reflect and of hindsight, concludes that an officer acting under pressure in the field, maybe under fear for his own life, failed properly to apply the often confused and confusing standards of conduct set out by courts interpreting the Constitution.

Judge Wilkey also observed that in cases in which the law is not settled, courts "would have to impute to [police officers]

Quite clearly, it is in these "grey, twilight area[s], where the law is difficult for courts to apply, let alone for the policeman on the beat to understand," that the exclusionary rule is least efficacious in deterring police misconduct. *Schneckloth* v. *Bustamonte*, 412 U.S. at 269 (Powell, J., concurring).[18]

4. The reasonable mistake exception to the exclusionary rule that we advocate here is consistent with this Court's recognition of the ameliorating effects of police good faith in other Fourth Amendment contexts.[19] For example, in *Michigan* v. *DeFil-*

---

nearly supernatural powers to see the future before we could charge [them] with knowledge that [their] conduct was unconstitutional" (655 F.2d at 1181).

[18] If concrete examples of the problem are necessary, one need only look to the Court's decisions in *New York* v. *Belton*, 453 U.S. 454 (1981), and *Robbins* v. *California*, 453 U.S. 420 (1981). The facts of the cases were remarkably similar. In both cases, police officers lawfully stopped a car, smelled burnt marijuana, discovered marijuana in the passenger compartment of the car, and lawfully arrested the occupants. Thereafter, in *Robbins*, the officer found two packages wrapped in green opaque paper in the recessed rear compartment of the car, opened them without a warrant, and found 30 pounds of marijuana. In *Belton*, the officer found a jacket in the passenger compartment, unzipped the pocket without a warrant, and found a quantity of cocaine.

When the Court decided these cases, three Justices opined that both searches were legal; three Justices opined that they were both illegal; and three Justices controlled the ultimate decision that the search in *Robbins* was illegal and that in *Belton* legal. It may come as small consolation to the officer who made the search in *Robbins* that only a year later the decision was overruled in *United States* v. *Ross*, 456 U.S. 798 (1982).

[19] We speak in this brief of a "reasonable mistake" exception to the exclusionary rule, rather than a "good faith" ex-

lippo, 443 U.S. 31 (1979), a police officer made an arrest in good-faith reliance on a municipal ordinance later declared to be unconstitutional. In an ensuing search incident to the arrest, the officer seized drugs from the defendant's person. In upholding the admissibility of the seized drugs, the Court stated (*id.* at 37-38):

> A prudent officer, in the course of determining whether [the defendant] had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional. * * * [20]

Similarly, in *United States* v. *Caceres*, 440 U.S. 741 (1979), Internal Revenue agents conducted a series of "consensual electronic surveillance" encounters with a targeted taxpayer. Although internal agency guidelines required prior authorization for such surveillance, the agents failed to obtain written author-

---

ception, because, as discussed later (see pages 78-80, *infra*), we believe that the test for invocation of the exception should be objective in nature. The "good faith" terminology has the unfortunate consequence of suggesting that good intentions, even if objectively unsupportable, should be the touchstone, a proposition we do not advocate. But the "good faith" cases already decided by this Court and discussed in this section of our brief all satisfy the objective standard of reasonableness that we propose and could have been decided on that basis.

[20] The Court recognized (443 U.S. at 38 n.3):

> The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the [defendant], was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule.

ization. Refusing to require suppression of the fruits of the unauthorized surveillance, the Court noted that "[t]he agency action, while later found to be in violation of the regulations, nonetheless reflected a reasonable, good-faith attempt to comply in a situation" in which monitoring was appropriate and would have been authorized had the request for authorization been received more promptly (*id.* at 757). So too, in *Hill* v. *California*, 401 U.S. 797 (1971), officers had probable cause to arrest Hill; however, the officers mistakenly arrested one Miller, who was present in Hill's apartment, and conducted a search incident to the arrest that disclosed evidence incriminating Hill. In upholding the validity of the seizure, the Court stated: "The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But * * * the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time" (*id.* at 803-804). And in *Franks* v. *Delaware*, 438 U.S. 154 (1978), the Court limited the circumstances in which a defendant may challenge the truthfulness of allegations in a search warrant affidavit to those effectively involving official bad faith. Thus, as the Court made clear, "[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth * * *. Allegations of negligence or innocent mistake are insufficient" (*id.* at 171).

5. Finally, the reasonable mistake exception to the exclusionary rule that we propose comports fully with the context in which the rule was first promulgated and then applied to the states. It has been noted that pre-*Mapp* cases frequently involved "arrogant or brazen police behavior." Schroeder, *Deterring Fourth*

Amendment Violations: Alternatives to the Exclusionary Rule, 69 Geo. L.J. 1361, 1414-1415 (1981) (footnote omitted). As we observed at the outset (see page 27, *supra*), both *Weeks* and *Mapp* involved warrantless, exploratory searches through private papers and effects. So too, many of the early cases in which the exclusionary rule was first applied involved equally egregious misconduct.[21] In keeping with this historical perspective, nothing in the modification we propose will prevent courts from excluding evidence obtained through intentional or clearly abusive police misconduct.

But it makes no sense to apply a rule of suppression that was conceived in the context of palpably egregious police misconduct to the multitude of present-day cases in which law enforcement officers make all reasonable efforts to comply with the Constitution. Police resort to the preferred warrant procedure has markedly increased in the years since *Mapp* was decided (see 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2, at 26 (1978)), law enforcement officers have to a far greater extent become well-trained professionals, and the cases now being litigated most often probe the "grey, twilight area[s]" of Fourth Amendment law,

---

[21] See, *e.g.*, *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 390-391 (1920) (prosecutor conceded "outrageous" conduct based on a warrantless documents search conducted "without a shadow of authority"); *Gouled* v. *United States*, 255 U.S. 298 (1921) (surreptitious document search); *Agnello* v. *United States*, 269 U.S. 20 (1925) (warrantless search of home as incident to an arrest that occurred blocks away); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931) (warrantless, exploratory search of documents); *United States* v. *Jeffers*, 342 U.S. 48, 52 (1951) (warrantless search of hotel room conducted "surreptitiously and by means denounced as criminal").

rather than directly touching the core values of that constitutional protection. Against this background, neither the fundamental values of the Fourth Amendment nor the deterrent purpose of the exclusionary rule are meaningfully advanced by the suppression of evidence when law enforcement officers, even though acting without a warrant, reasonably attempt to navigate the intricate channels of Fourth Amendment law. Simply put, when law enforcement officers have acted in a manner far removed from the egregious type of conduct that the exclusionary rule was first designed to combat, their honest mistakes should not be met with the severe sanction of suppression.

B. The Reasons For Applying The Exclusionary Rule Are Most Remote When Law Enforcement Officers Have Relied On A Judicially-Issued Search Warrant

1. As we have demonstrated, the purpose of the exclusionary rule is to deter unconstitutional actions by the police. When law enforcement officers reasonably, albeit mistakenly, believe that they are acting lawfully, the potential for deterrence is drastically diminished and the social value of deterrence greatly reduced. In those circumstances, the justification for the suppression remedy vanishes. That is the situation in *Quintero*. Equally important, however, is the fact that *no* credible justification has ever been advanced for invoking the exclusionary rule when, as in *Leon* and *Sheppard*, the police have not engaged in any misconduct whatsoever, but a judicial officer has issued a search warrant that is subsequently held to be defective. "This Court has never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant; it has simply done so without considering whether Fourth Amendment interests are advanced." *Gates*,

slip op. 17 (White, J., concurring). The situation is thus remarkably similar to that presented in *Stone* v. *Powell*, in which the Court acknowledged that its prior decisions had not fully considered the extent to which the exclusionary rule should apply in federal habeas corpus proceedings (428 U.S. at 480-481 & n.15). Upon examination, of course, the Court concluded that the cost of permitting state prisoners to relitigate search and seizure issues outweighed any incremental deterrent effect that might flow from application of the exclusionary rule in that context. Here, too, the Court is presented with its first real occasion to examine the policies of the exclusionary rule as they relate to evidence obtained pursuant to a warrant. As in *Stone* v. *Powell*, should that examination reveal the absence of sufficient justification for continuing to apply the exclusionary rule in such circumstances, the Court should not hesitate to modify the rule.

2. In our submission, the exclusionary rule is an inherently inappropriate device for deterring Fourth Amendment violations that are the result of judicial miscalculation, rather than police misconduct. As the Court observed in *Janis* (428 U.S. at 448), application of the exclusionary rule must be tied to the identity of those who are to be deterred and the nature of the conduct that is to be controlled. In the Fourth Amendment context, "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges." *Gates*, slip op. 18 (White, J., concurring). Accordingly, as was recognized by the plurality in *Sheppard* (82-963 Pet. App. A47-A49):

> The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as

> costly as it is when it is applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that [a] search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is necessary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

See also *United States* v. *Acosta*, 501 F.2d 1330, 1337 (5th Cir. 1974) (Gee, J., dissenting), modified, 509 F.2d 539 (5th Cir.), cert. denied, 423 U.S. 891 (1975); *State* v. *Lien*, 265 N.W.2d 833, 840-841 n.1 (Minn. 1978); *State* v. *Nolting*, 312 Minn. 449, 456-457 n.7, 254 N.W.2d 340, 345 n.7 (1977).

Thus, even if one accepts the premise that the exclusionary rule is capable of affecting police behavior in some circumstances, there is no basis whatsoever for assuming that it can have any impact on magistrates. Magistrates are not part of the law enforcement "team" (see *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450-453 (1971)); as neutral judicial officers, magistrates have no stake in the outcome of any criminal prosecution, and the threat that evidence may be excluded from trial cannot logically be expected to have a significant deterrent impact on them. Instead, judicial officers considering warrant applica-

tions presumably are motivated—like judicial officers performing other duties—to reach a correct decision.[22]

---

[22] There is no constitutional requirement that an official issuing a warrant be either a judge or a lawyer, so long as the official is neutral and capable of assessing probable cause. See *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348-350 (1972). In the federal system, however, magistrates will usually be trained and experienced lawyers. Thus, the Federal Magistrates Act of 1968 requires, with limited exceptions, that all magistrates have practiced law for five years (28 U.S.C. (Supp. V) 631 (b) (1)), that they be selected pursuant to merit selection procedures (28 U.S.C. (Supp. V) 631(b) (2)), and that they attend special training programs (28 U.S.C. 637). Although neither constitutionally required nor necessary to give rise to the preference that reviewing courts extend to a magistrate's determinations, we think these salutary features enhance the presumption of propriety that applies to a federal magistrate's probable cause determinations. These same enhancing considerations also apply to the warrants in *Leon* and *Sheppard*, both of which were issued by state court judges.

Moreover, because the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" (*Calandra*, 414 U.S. at 348), relentless application of the rule in warrant cases is both unnecessary and unwise because suitable and efficacious substitute remedies, less costly to society, are available, at least in the federal system. A United States Magistrate, unlike a law enforcement officer, is subject to the control and direction of the district court and may be removed by the court for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. (Supp. V) 631(i). If it appears that a particular magistrate is serving merely as a "rubber stamp" or has demonstrated an inability to exercise mature judgment, a remedy is available that is far more direct and effective, and less costly to the criminal justice system, than the suppression of evidence in a later proceeding. Cf. *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-7 & n.5 (deterrence rationale is an inappropriate basis for applying most severe sanctions when more narrowly tailored sanctions are available).

3. The suppression of evidence obtained pursuant to judicially-issued search warrants, even though an unintended extension of the exclusionary rule as originally conceived, might be justified if it furthered the rule's basic purpose of deterring police misconduct. But in fact it does no such thing. See *Gates*, slip op. 17 (White, J., concurring). Rather, "[i]mposing an admittedly indirect 'sanction' on the police officer in that instance is nothing less than sophisticated nonsense" (*Stone* v. *Powell*, 428 U.S. at 498 (Burger, C.J., concurring)), because law enforcement officers will never be deterred from executing a search warrant that a judge has told them is valid. "Once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Ibid.*[23] See *United States* v. *Hill*, 500 F.2d 315, 322 (5th Cir. 1974); *Gifford* v. *State*, 630 S.W.2d at 391; cf. *United States* v. *Ross*, 456 U.S. 798, 823 n.32 (1982) ("[A] warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search"); *United States* v. *Alvarez-Porras*, 643 F.2d 54, 65-66 (2d Cir.), cert. denied, 454 U.S. 839 (1981) (deterrent purpose of exclusionary rule is not served in circumstances that include the agents' good-faith

---

[23] As Professor Levy has noted (L. Levy, *Against the Law: The Nixon Court and Criminal Justice* 81 (1974)):

> [T]o penalize the police by holding that a magistrate had not scrutinized the facts with enough independence is comparable to penalizing a prosecutor by holding that the police obtained the evidence illegally. The sanction of the law strikes the wrong party when the police have obtained a warrant.

attempt to comply with the warrant requirement).[24] Quite clearly, neither the fundamental values of the Fourth Amendment nor the deterrent purpose of the exclusionary rule can be meaningfully advanced by the suppression of evidence in cases such as *Sheppard*, where a search warrant is invalidated because of a technical defect resulting from oversight;[25] suppressing it because the issuing official, although authorized by statute to issue warrants, is found to lack the requisite degree of neutrality, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971);[26] or suppressing it

---

[24] See also Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1418-1419 (1981):

> A search conducted in accordance with the terms of the warrant necessarily involves good faith * * *. When the police have dutifully applied to a judge or a magistrate for a search warrant, and have executed the warrant in strict conformity with its terms, exclusion of the evidence thus obtained can have no possible deterrent effect on future police conduct.

Accord, P. Johnson, *New Approaches to Enforcing the Fourth Amendment* 8-9 (Working Paper Sept. 1978), quoted in 1 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 1.2, at 3 (Supp. 1982).

[25] See also *United States* v. *Shorter*, 600 F.2d 585 (6th Cir. 1979). In that case, suppression was ordered because, despite a clear demonstration of probable cause, the magistrate failed to administer an oath to the affiant "immediately" at the beginning of his telephonic application for a search warrant, as required by Rule 41 (c) (2) (D), Fed. R. Crim. P.

[26] Concurring in *Coolidge*, Justice Harlan noted that nothing in the unlawful conduct in that case touched on "core" Fourth Amendment values (403 U.S. at 491). See also *Bivens*, 403 U.S. at 418-419 (Burger, C.J., dissenting) (even assuming the conduct in *Coolidge* was improper, it "was surely insufficient in nature and extent to justify the drastic result dictated by the suppression doctrine"); Kaplan, *supra*, 26 Stan. L. Rev.

because, as in *Leon*, a reasonable presentation of information to a neutral judicial officer is later determined to fall short of probable cause, *e.g.*, *United States* v. *Karathanos*, 531 F.2d 26, 35 (2d Cir.), cert. denied, 428 U.S. 910 (1976); *United States* v. *Travisano*, 560 F. Supp. 627, 628-630 & n.2 (D. Conn. 1983), pending on appeal, No. 83-1159 (2d Cir., filed Apr. 28, 1983).

4. Application of the exclusionary rule to the fruits of judicially-warranted searches is not only ineffective in terms of deterrence, but may well reduce incentives for police resort to the warrant procedure, which this Court has repeatedly held is the constitutionally preferred method for safeguarding individual privacy rights. See *Gates*, slip op. 21; *United States* v. *United States District Court*, 407 U.S. 297, 317 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968); *United States* v. *Ventresca*, 380 U.S. 102, 106-107 (1965); *Johnson* v. *United States*, 333 U.S. 10, 14 n.3 (1948); 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.2, at 29 (1978).[27] Thus, a reasonable mistake exception to the exclusionary rule when a warrant has been obtained would provide a substantial incentive for law enforcement officers to utilize the preferred warrant procedure. See *Brown* v. *Illinois*, 422 U.S. at 611 & n.3 (Powell, J., concurring). Unlike instances in which

---

at 1036 ("the police practices revealed in *Coolidge* v. *New Hampshire* are hardly incompatible with a moral society; yet letting the defendant in that case go free perhaps is").

[27] In explaining the essence of the Fourth Amendment, the Court has stated: "[W]here practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." *United States* v. *United States District Court*, 407 U.S. at 316.

the police have acted without judicial authorization and in which an exclusionary rule might, in limited circumstances, provide a deterrent to future misconduct, resort to the warrant procedure itself provides a substantial alternative barrier to unreasonable or otherwise defective searches and seizures. See *Jones* v. *United States*, 362 U.S. 257, 270-271 (1960); *Johnson* v. *United States*, 333 U.S. at 14; *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). For this reason, the Court has recognized that errors of judgment by a magistrate should not necessarily be treated as severely as Fourth Amendment violations by law enforcement officers acting without judicial supervision and approval. See *Gates*, slip op. 21, 24; *United States* v. *Watson*, 423 U.S. 411, 423 (1976); *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969); *United States* v. *Ventresca*, 380 U.S. at 109; *Aguilar* v. *Texas*, 378 U.S. 101, 111 (1964); *Jones* v. *United States*, 362 U.S. at 270-271. As the Court explained in *Aguilar*, 378 U.S. at 111, quoting *Jones*, 362 U.S. at 271:

> [W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . ."

A reasonable mistake exception to the exclusionary rule in the case of evidence seized pursuant to a warrant would thus fully comport with the special status the Court has attached to warrants in the past.

5. We do not suggest that the exclusionary rule is never appropriate when a search has been conducted pursuant to a warrant, or that the mere issuance of a warrant wholly forecloses further inquiry into the existence of probable cause. Even when a warrant has been obtained, suppression of evidence may be justified if the factors relied on by the magistrate "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Brown* v. *Illinois*, 422 U.S. at 610-611 (Powell, J., concurring), or if the warrant was procured in bad faith or on the basis of material misrepresentations, see *Franks* v. *Delaware*, 438 U.S. 154 (1978). See also *Gates*, slip op. 19 (White, J., concurring).

For example, in *Nathanson* v. *United States*, 290 U.S. 41, 46 (1933), a search warrant was obtained "upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts." Similarly, in *Aguilar* v. *Texas*, 378 U.S. at 109 & n.1, the warrant was based on a "bare-bones" affidavit which, although averring probable cause, supplied no supporting facts. While the officers who executed the search warrants in *Nathanson* and *Aguilar* perhaps acted in good faith, certainly no officer today could reasonably rely on the validity of similar warrants in light of the unambiguous legal authority condemning "bare-bones" affidavits. Application of the exclusionary rule in such circumstances would be consistent with its historic underpinnings. But as Professor Amsterdam has written, "the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).[28]

---

[28] In his concurring opinion in *Gates*, Justice White stated that he would apply the exclusionary rule "when it is plainly

Manifestly, the rare circumstances that might justify exclusion of the fruits of a judicially-warranted search are not present in the cases now before the Court. In *Leon*, the police took meticulous care to ensure that their conduct at all times comported with constitutional requirements. First, rather than acting precipitously based on an informant's tip, the police independently investigated the allegations in the tip through extensive surveillance of respondents and their various residences. When their surveillance confirmed the accuracy of much of the information provided in the tip, the police did not act on their own initiative, but instead sought a warrant from a neutral judicial officer.[20] Moreover, they provided the

---

evident that a magistrate or judge had no business issuing a warrant" (slip op. 19). To the extent that this approach would focus on the conduct of the issuing magistrate, it appears to be analytically contrary to the proposition that the exclusionary rule is meant to deter police, not judicial, misconduct. In practice, however the distinction may be of little significance. In our view, those situations in which "a magistrate or judge had no business issuing a warrant" are probably coextensive with those situations in which "no well-trained officer could reasonably have thought that a warrant should issue" (*ibid.*). Thus, for exclusionary rule purposes, the danger of a hypothetical "runaway" magistrate can effectively be controlled by focusing on the objective reasonableness of the conduct of law enforcement officers in applying for and executing the search warrant. Of course, as we have noted above (see page 60 note 22, *supra*), personal sanctions are available to punish federal magistrates who are derelict in their duties.

[20] Because the officers' suspicion in this case focused in part on respondents' various automobiles, the police were not constitutionally obliged to obtain a warrant for that part of their proposed search. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Their decision to seek prior judicial approval for the search of the automobiles is indicative of the reasonableness of their conduct.

judicial officer with every bit of information they possessed that would assist him in making a reasoned, independent decision. And they executed the warrant properly and with no reason to be on notice that it was not valid. In turn, the judge issuing the warrant clearly had at least "reasonable cause to believe there was reasonable cause." H. Friendly, *Benchmarks* 261 (1967). In these circumstances, it would advance no Fourth Amendment policy to suppress the seized evidence.

While the kind of defect present in *Sheppard* is quite different from that found by the court of appeals in *Leon*, there too the Fourth Amendment would not be well-served by suppression. Admittedly, the search warrant was technically defective, and the defect, had it been noticed, would have been obvious to the issuing judge and to the officers as well. Moreover, the defect *could* have been significant if, for example, the police had attempted to exploit it by searching for items, such as drugs, for which they lacked probable cause and which the judge had not intended to authorize. But no such abuses occurred here. Instead, there is no question that the police had probable cause to seize the items specified in the warrant application, it is undisputed that the judge thought he was authorizing the police to conduct only the search described in the warrant application, and it is further undisputed that the police did in fact limit their search to that for which they thought they had valid authorization. The failure of the warrant to specify the items to be seized was, in short, entirely nonprejudicial to Sheppard's right to be free from unreasonable searches and seizures. Under these circumstances, only a policy of attempting to deter even

the most harmless human error could justify invocation of the exclusionary rule.[30] Such a policy would bear not the slightest resemblance to the policies that led to the exclusionary rule that the Court fashioned in *Weeks* and *Mapp*.[31]

C. In Light Of The Exclusionary Rule's Inability To Fulfill Its Deterrent Purpose When Applied To Reasonable Mistakes, Its Costs Are Higher Than Our System Of Criminal Justice Can Afford

Many of the costs of the exclusionary rule have been alluded to in previous sections of this brief. Nevertheless, in completing the cost-benefit analysis that we commend to the Court, it is appropriate to recapitulate briefly the most obvious costs and to elaborate more fully on some of the less evident ones.

First, the exclusionary rule excludes from consideration at trial the very evidence that is most relevant and trustworthy.[32] The rule thus subverts

---

[30] As previously noted (see page 44 note 11, *supra*), the ALI has recognized that such a policy is inappropriate, and that striking the proper balance requires an assessment of the substantiality of the violation.

[31] We recognize that the Court has not heretofore applied the harmless error rule in considering the applicability of the exclusionary rule, but the facts in *Sheppard* quite clearly justify such an approach. The harmless error rule has of course long encompassed constitutional as well as non-constitutional errors (see *Chapman* v. *California*, 386 U.S. 18, 22 (1967)), and there is no reason why it should not encompass Fourth Amendment violations that do not result in any impairment of substantial rights of the defendant.

[32] As Judge Wilkey has observed, "it is all important that *there is never any question of reliability* in exclusionary rule cases involving material evidence * * *. An illegal search in no way reduces the reliability of the evidence." Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 215, 222 (1978) (emphasis in original).

the courts' paramount truthfinding function. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 489; *id.* at 499-500 (Burger, C.J., concurring); *Janis*, 428 U.S. at 448-449.

Second, the exclusionary rule directly benefits only those who are unquestionably guilty. In the now-famous words of Justice Cardozo, particularly apt to consideration of a reasonable mistake exception, the rule allows "[t]he criminal * * * to go free because the constable has blundered." *People* v. *Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, cert. denied, 270 U.S. 657 (1926). The rule does nothing, however, to repair injury to innocent victims of unreasonable searches. While, judiciously applied, it may prevent future violations of constitutional rights, that objective can be accomplished by limiting use of the suppression sanction to cases in which substantial deterrence of future misconduct can realistically be expected.

Proponents of the exclusionary rule have argued that only a very small number of guilty defendants actually go free because of it, and that this is a small price to pay to safeguard the Fourth Amendment rights of all citizens.[33] In addition to the fact that the freeing of even one guilty defendant by virtue of an irrational application of the rule may exact a greater cost than society should be expected to bear (see pages 71-73, *infra*), this argument disregards evidence that tends to demonstrate very real costs, in numerical terms, of the rule's operation.

It is no doubt true, as Justice White observed (*Gates*, slip op. 12 (White, J., concurring)), that

---

[33] See, *e.g.*, *The Exclusionary Rule Bills: Hearings on S. 101, S. 751 and S. 1995 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 35-37 (1981) (testimony of Stephen H. Sachs); 1 W. LaFave, *Search and Seizure* § 1.2 n.9, at 1 (Supp. 1982).

"[w]e will never know how many guilty defendants go free as a result of the rule's operation," but still certain conclusions are possible (*id.* at 12 n.13):

> The effects of the exclusionary rule are often felt before a case reaches trial. A recent study by the National Institute of Justice of felony arrests in California during the years 1976-1979 "found a major impact of the exclusionary rule on state prosecutions." National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 2 (1982). The study found that 4.8% of the more than 4,000 felony cases declined for prosecution were rejected because of search and seizure problems. The exclusionary rule was found to have a particularly pronounced effect in drug cases; prosecutors rejected approximately 30% of all felony drug arrests because of search and seizure problems.[34]

---

[34] A 1979 study by the General Accounting Office concluded that of all cases declined for prosecution by United States Attorneys, Fourth Amendment search and seizure problems were the *primary* reason for declination in only 0.4% of the total. Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 14 (1979) [hereinafter cited as *GAO Report*]. Federal declinations may be low, however, because relatively few federal cases involve manifestly illegal searches. Assistant United States Attorneys may thus choose to go forward in a significant number of cases that have search and seizure problems that may be assessed as troublesome but worth litigating. This hypothesis is borne out by the frequency with which suppression motions are denied (*GAO Report*, *supra*, at 10). Moreover, it was later determined that "[m]ost of the federal caseload at the time the [GAO] study was conducted was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases." National Institute of Justice, *The Effects of the Exclusionary Rule: A Study in California* 7 (1982) [hereinafter cited as *NIJ Report*].

Moreover, in cases in which prosecutors elect to proceed to trial despite successful suppression motions, the resulting conviction rates are dramatically impaired. *GAO Report*, *supra* note 34, at 13.[35] Although the systemic effects of the exclusionary rule have never been fully calculated, the limited studies available thus demonstrate that a definite relationship exists between the suppression of evidence and the prosecution's ability to obtain a conviction.[36]

But even if the numerical impact of the exclusionary rule were to be discounted, the rule exacts an exceedingly high societal cost. This Court has noted that the exclusionary rule may well serve to lessen public respect for the judicial system. "Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generat-

---

[35] According to the GAO study, a conviction was obtained in more than 84% of the cases in which a suppression motion had been denied. The conviction rate dropped dramatically, however, to about 50%, whenever a suppression motion had been granted in whole or in part. *GAO Report*, *supra* note 34, at 13.

[36] The deleterious effects of the exclusionary rule on law enforcement are exacerbated by its tendency in practice to free the recidivist. As the NIJ study noted (*NIJ Report*, *supra* note 34, at 2):

> For most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a longer criminal career.
>
> • • • • •
>
> To a substantial degree, individuals released because of search and seizure problems were those with serious criminal records who appeared to continue to be involved in crime after their release. The felony rearrests included many drug crimes, but the majority were for crimes against persons or property, or for other felony offenses.

ing disrespect for the law and administration of justice." *Stone* v. *Powell*, 428 U.S. at 490-491. Moreover, indiscriminate application of the exclusionary rule may foster a public perception that the courts are simply unaware of reality. See *Bivens*, 403 U.S. at 415 (Burger, C.J., dissenting) (deterrence rationale is "hardly more than a wistful dream").[37]

In part, this problem of public perception arises because the exclusionary rule, as currently applied, lacks the vital ingredient of proportionality.[38] As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 490 (footnote omitted): "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."[39] This cost of the exclusion-

---

[37] It may be significant in this regard that "no other civilized country has adopted our mandatory rule of the exclusion of probative material evidence because of police misconduct." Wilkey, *supra*, 1 Crim. Just. Ethics at 23. Moreover, the decision of other countries *not* to adopt an exclusionary rule has generally come after careful and deliberate study. See, *e.g.*, *id.* at 23-24 & 26-27 nn. 26-35.

[38] Prompted by the belief "that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation," the Attorney General's Task Force on Violent Crime has recommended the adoption of a reasonable good-faith exception to the exclusionary rule. *Attorney General's Task Force on Violent Crime, Final Report* 55-56 (1981).

[39] Judge Wilkey has made the same point, perhaps more graphically, dissenting in *United States* v. *Ross* (655 F.2d at 1208), in language that foreshadows the *Sheppard* case:

> [The] penalty [of the exclusionary rule] is administered with a sense of proportionality reminiscent of those medieval penal systems that prescribed capital punishment for everything from pickpocketing on up. The rule falls mer-

ary rule is particularly evident in cases such as those now before the Court, in which it cannot seriously be urged that the police engaged in any misconduct. See pages 48-49, 66-68, *supra*. On the other hand, there can be little doubt that the suppressed evidence, if admitted, would conclusively establish the respondents' guilt.

The chilling effect on legitimate police activities is another less visible but equally important cost specifically associated with suppression of evidence garnered in good faith violations of the Fourth Amendment. As the circumstances surrounding a particular proposed course of action bring it closer to the indistinct line often separating lawful from unlawful searches or seizures, a relentless application of the exclusionary rule is increasingly likely to deter the former rather than the latter, since almost by definition this class of situations is as likely to involve legal as illegal police activity.[40] "To the extent the rule operates to discourage police from reasonable and proper investigative actions, it hinders the solution and even the prevention of crime." *Gates*, slip op.

---

cilessly on evidence deemed to have been seized unconstitutionally, without regard for the gravity of the police misconduct or the seriousness of the crime of which the defendant has been charged. Even if the policeman's actions were only marginally in violation of the Constitution despite his good faith while the criminal is guilty of rape and murder, still the evidence stays out. Such a disproportion would be regarded as barbaric if used to deter crime; ironically, employed to deter the police many apparently consider it "progressive."

[40] In addition, these are the very cases in which it is most likely that courts would *erroneously* conclude that the Fourth Amendment has been violated, with the unhappy result of suppressing lawfully obtained evidence. See page 51 note 16, *supra*.

12 (White, J., concurring). Once application of the rule approaches the point at which it is as likely to chill legitimate police action as to discourage marginally improper action, powerful justifications indeed are needed to justify such results.[41]

Still another cost of the exclusionary rule is its failure to provide any remedy for the innocent victims of unlawful searches and seizures. Even for the criminal defendant, the primary effect of the rule's application—aiding him to secure an acquittal even though he is guilty—does not itself repair the breach of privacy that the Fourth Amendment protects. See *Calandra*, 414 U.S. at 347; *Linkletter* v. *Walker*, 381 U.S. at 637. And the exclusionary rule is, of course, an entirely meaningless "remedy" when the victim of the unlawful search is never accused of a crime. See *Bivens*, 403 U.S. at 410 ("[f]or people in Bivens' shoes, it is damages or nothing"); *id.* at 415-416, 417-418 (Burger, C. J., dissenting).

A further cost of the exclusionary rule, often paid insufficient attention, is the burden it places on the judicial system. One-third of federal defendants going to trial file Fourth Amendment suppression motions, and 70% to 90% of these involve formal hearings. *GAO Report*, *supra* note 34, at 10. Although most of these motions are denied (*ibid.*), the effect on judicial and prosecutorial resources is the same as if

---

[41] The Court has recognized the same point in holding that public officials enjoy at least qualified immunity in civil damages actions brought under 42 U.S.C. 1983. In *Scheuer* v. *Rhodes*, 416 U.S. 232, 242 (1974), the Court observed:

> Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

the motions were meritorious. Significantly, the result of this diversion of resources from criminal trials to pretrial motions may have its harshest impact on innocent defendants. See *United States* v. *Ross*, 655 F.2d at 1205-1206 (Wilkey, J., dissenting):

> To understand how the innocent defendant is victimized by the diversion of scarce resources from criminal trials to police discipline, it is necessary briefly to consider how our criminal justice system now operates in fact, if not in theory. * * * [It] ensures that more due process will be required than the system can afford to pay for. As a result, trials have now been priced too high to be held in most circumstances * * *.
>
> Instead, we have come increasingly to rely on an informal system of negotiated settlements in the form of plea bargained arrangements between prosecutor and defendant. The results are woeful. Criminals guilty of grievous offenses routinely are permitted to escape with convictions for crimes far less serious carrying only wrist-slapping penalties. Meanwhile innocent defendants who might well have been vindicated at trial are coerced into settling for a conviction on a lesser charge * * *.
>
> It is against this background that we must measure the diversion of energy, talent and dollars from the central task of fairly determining the guilt and innocence of defendants into the work of adjudicating whether the police have blundered. * * * That function should be performed elsewhere and by others. The exclusionary remedy thus literally buys what little in the way of Fourth Amendment protection it affords at the cost of more trials for criminal defendants. Even if the rule did a fair job of promoting

> Fourth Amendment values, this would be at best a questionable bargain.[42]

Finally, the exclusionary rule in the long run threatens the very Fourth Amendment values it is intended to safeguard. "If one were diabolically to attempt to invent a rule sure slowly to undermine the substantive reach of the Fourth Amendment, it would be hard to do better than the exclusionary rule." *United States* v. *Ross*, 655 F.2d at 1206 (Wilkey, J., dissenting). This is because of the obvious reluctance of judges to condemn questionable practices under the Fourth Amendment when they know that the result of their decision will be the freeing of a guilty defendant. The Court has noted the same effect in considering the permissibility of a retrial under the Double Jeopardy Clause (*United States* v. *Tateo*, 377 U.S. 463, 466 (1964) (emphasis added)):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained

---

[42] The workload generated by the exclusionary rule does not, of course, cease at the trial court level. For example, Judge Wilkey has pointed out that, over a three-year period, 22.1% of the published opinions of the United States Court of Appeals for the District of Columbia Circuit in criminal cases involved suppression issues. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule*, 95 F.R.D. 211, 220 (1982). Similarly, a substantial portion of this Court's criminal docket regularly involves Fourth Amendment search and seizures issues. See page 51 note 16, *supra*. This expenditure of judicial resources on suppression issues continues unabated even though "the general principles applicable to claims of Fourth Amendment violations are well settled * * *." *Arkansas* v. *Sanders*, 442 U.S. 753, 757 (1979). The most plausible explanation for this phenomenon, of course, is that the windfall benefits of the exclusionary rule for guilty defendants are so great that they effectively negate the likelihood of meaningful self-screening.

such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. *From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.*

Similar concerns operate in the context of the exclusionary rule. In addition, public support for the values served by the Fourth Amendment can too easily be undermined by a general perception that Fourth Amendment jurisprudence is bringing about the seemingly unjustified release into society of dangerous criminals. Thus, extravagant applications of the rule cannot help but threaten the substantive safeguards of the Fourth Amendment.

D. The Objections To A Reasonable Mistake Exception To The Exclusionary Rule Are Insufficient To Overcome The Need For Modification

We think it evident that the foregoing cost-benefit analysis of the exclusionary rule demonstrates the need for a properly designed reasonable mistake exception to the rule. Although many of the practical details concerning the application of such an exception are best left to future cases and initial resolution by lower courts, cf. *United States* v. *Williams*, 622 F.2d at 847; *United States* v. *Nolan*, 530 F. Supp. at 399, we shall undertake briefly to answer some of the most commonly-voiced objections to our proposal.

1. Critics of a reasonable mistake exception to the exclusionary rule invariably argue that it would "put[] a premium on 'police ignorance.'" [43] This is a palpable strawman. As the Fifth Circuit explained in *Williams*, 622 F.2d at 841 n.4a, the test for applying the exception is essentially objective:

> We emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness. It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe that he was acting lawfully. Thus, a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment could never qualify.[44]

See also *Gates*, slip op. 21 (White, J., concurring); *United States* v. *Nolan*, 530 F. Supp. at 399; *People* v. *Adams*, 53 N.Y.2d at 9-10, 422 N.E.2d at 541; Carrington, *Good Faith Mistakes and the Exclusionary Rule*, 1 Crim. Just. Ethics 35, 38-39 (1982); Schroeder, *supra*, 69 Geo. L.J. at 1420; Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 655 (1978); cf. *Scott* v. *United States*, 436 U.S. 128, 137-138 (1978).

The objective standard we propose ensures that ignorance will not be rewarded. On the contrary, "[g]rounding the modification in objective reason-

---

[43] See, *e.g.*, Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. Just. Ethics 28, 32 (1982).

[44] The Fifth Circuit's good-faith exception thus entails a subjective component. See also *United States* v. *Mahoney*, slip op. 6704-6705. For the reasons discussed below, however, it is our submission that the subjective inquiry will almost always be unnecessary and inappropriate.

ableness * * * retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment." *Gates*, slip op. 15-16 n.15 (White, J., concurring). Because such an objective standard requires individual officers to have a reasonable knowledge of what the law prohibits, see *United States* v. *Peltier*, 422 U.S. at 542; *United States* v. *Ajlouny*, 629 F.2d at 841; *United States* v. *Nolan*, 530 F. Supp. at 399, the adoption of a reasonable mistake exception may actually enhance, but in any event certainly will not discourage, efforts to educate police officers about the extant principles of law. To avoid the risk of suppression through unreasonable ignorance,[45] police departments can be expected (assuming validity in the hypothesis of deterrence by which the rule is justified in the first place) to ensure that individual officers are reasonably well trained, especially as the extent to which a police department takes seriously its duty of providing training and guidance to officers in the field might be considered in determining whether the exclusionary rule should be invoked. See *Gates*, slip op. 15-16 n.15 (White, J., concurring); Kaplan, *supra*, 26 Stan. L. Rev. at 1050-1051.

The objective standard we propose is consistent with the standard applied in civil suits against public officials for alleged deprivations of constitutional rights. See *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 17: "government officials performing discretionary functions generally are shielded

---

[45] See, *e.g.*, *United States* v. *Downing*, 665 F.2d 404, 408 n.2 (1st Cir. 1981) (no occasion to apply a good faith exception because the necessary predicate of objectively reasonable police conduct not satisfied); *Holloman* v. *Commonwealth*, 221 Va. 947, 950, 275 S.E.2d 620, 622 (1981) (accord).

from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [46] Importantly, the Court in *Harlow* expressly rejected the civil equivalent of the "premium on police ignorance" argument (*id.* at 18; footnotes omitted):

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

The same considerations apply with equal force to criminal law enforcement.

2. Because the focus of the inquiry will be objective reasonableness, rather than an officer's subjective intent, the reasonable mistake exception we propose is not likely to burden the courts unduly. Generally, it will be unnecessary for courts to engage in unwieldy

---

[46] As the Court explained (*Harlow*, slip op. 17-18):

> If the law at that time [of the official's action] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

and awkward inquiries into the subjective intent of arresting or searching officers. Instead, a reasonable mistake exception would require only an objective assessment of the officer's conduct in light of the factual circumstances of a particular case and the extent to which the governing legal principles had been predictably articulated.[47] It will, therefore, merely require courts to make determinations of a kind that are not materially different from those they presently make in ruling upon suppression motions.[48]

---

[47] Furthermore, it seems unlikely that there will be many occasions on which a reasonable officer would not have known that his action was improper, but the particular officer did entertain such a belief; the inclusion of a subjective component will therefore rarely alter the result, but would instead merely produce burdensome and largely unproductive litigation. See *Harlow*, slip op. 18. It is possible, however, to imagine cases in which the objective reasonableness of a belief in the legality of particular conduct could be overcome by a showing that, for example, the victim of the search was singled out for harassment. In such strictly limited circumstances, a subjective inquiry might be appropriate. Plainly, no such circumstances are present in the cases now before the Court.

[48] Even if additional burdens were imposed, Judge Friendly has suggested that they would be preferable to the current system (H. Friendly, *Benchmarks*, *supra*, at 262; footnotes omitted):

> It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one. Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police.

3. It is sometimes suggested that the exclusionary rule is needed to provide Fourth Amendment cases for the courts to adjudicate. See, *e.g.*, Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hastings L.J. 1065, 1074 (1982); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives*, 1975 Wash. U.L.Q. 621, 654-656; Oaks, *supra*, 37 U. Chi. L. Rev. at 756. "The risk [in modifying the exclusionary rule] is that our constitutional rights will atrophy." Geller, *supra*, 1975 Wash. U.L.Q. at 655 (footnote omitted).

This presumed risk should be placed in proper perspective. Assuming, arguendo, that adoption of a reasonable mistake exception to the exclusionary rule would substantially reduce the incentive for defendants to litigate substantive Fourth Amendment questions, the Court should bear in mind that the lost decisionmaking opportunities will be confined to the "grey, twilight area[s]" of Fourth Amendment law where the constitutional violation, if any, is minimal. In these areas at least, it would seem that our society would reap greater benefits from a more rational application of the exclusionary rule than from continued judicial resolution of every Fourth Amendment question that inventive lawyers can devise. Just as there is a point of diminishing returns in the application of the exclusionary rule,[49] so too there is a point at which decisions of only marginal constitutional significance may be overpriced.

In any event, we are extremely skeptical about the validity of any assumption that defendants will lose their incentive to litigate meritorious substantive Fourth Amendment questions if confronted with a

---

[49] Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

reasonable mistake exception to the exclusionary rule. The overwhelming lack of success of most suppression motions (see page 74, *supra*) does not seem to have had any effect on the number of such motions filed. Practical experience tells us that criminal defendants commonly assert suppression claims with little regard for their ultimate chances of success—in part, no doubt, because of the magnitude of the benefit to them if "lightning" should strike. While adoption of a reasonable mistake exception will tend to discourage presentation of substantively insubstantial Fourth Amendment suppression motions, it thus seems highly improbable that litigation of colorable Fourth Amendment issues will "atrophy" to any significant degree.

Although the number of cases may not materially decline, there would be an important easing of the judicial workload because it would no longer be necessary for courts to decide every conceivable question of Fourth Amendment law. Many of the arguably meritorious Fourth Amendment claims that courts must now resolve present, like *Leon* and *Quintero*, fact-specific questions the resolution of which, while often difficult, does little to advance understanding of Fourth Amendment principles of general importance. In such instances, it will generally be far easier to determine the applicability of the reasonable mistake exception than to grapple with the nettlesome but relatively inconsequential underlying substantive question. The modification we propose should thus result in important advances for the cause of judicial economy.

On the other hand, we see no jurisprudential impediment to a court's undertaking to decide important, recurrent, and unsettled substantive Fourth Amendment questions even when the reasonable mistake exception may control the outcome of the partic-

ular case. That is precisely what this Court did in an analogous context in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). We therefore view the issue of whether to decide the substantive question first or to dispose of a case strictly on the basis of a reasonable mistake exception as one best committed to judicial discretion. In nonrecurring, fact-bound situations, a court might well conclude that little purpose is served by unnecessarily adjudicating the Fourth Amendment question. On the other hand, significant legal issues or particularly problematic factual situations of concern to a court could still be considered.[60]

This would be comparable to the approach now employed by this Court in applying the harmless error doctrine. In some cases, the Court exercises its discretion to decide the merits of a claim even though the error was harmless, while in others it resolves the case solely by reliance on the harmless error doctrine. Compare, *e.g.*, *Milton* v. *Wainwright*, 407 U.S. 371, 372 (1972) (Court declines to decide whether admission of confession was constitutional violation because error, if any, was harmless beyond a reasonable

---

[60] *United States* v. *Ajlouny*, 629 F.2d at 841-842, offers a good example of a court's sound exercise of discretion in *declining* to decide the legality of a search in light of the applicability of a good-faith exception. The legal question involved warrantless national security wiretaps. Subsequent to the surveillance of Ajlouny, the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. V) 1801-1811, became effective. That Act, by requiring prior court approval for nearly all foreign intelligence surveillance, "substantially reduced the importance of deciding in this case whether the Constitution independently requires the obtaining of a warrant for foreign intelligence electronic surveillance" (629 F.2d at 842). Accordingly, the court disposed of the case by relying on the good-faith exception. See also *United States* v. *Mahoney*, slip op. 6705 n.5 (merits of Fourth Amendment issue neither briefed nor argued and therefore court declines to decide the issue).

doubt), with *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (Court holds defendants constitutionally entitled to counsel at preliminary hearing, but remands to state court for determination whether denial of counsel was harmless error);[61] see also *United States* v. *Blackwell*, 694 F.2d 1325, 1340 n.22 (D.C. Cir. 1982) (court explains reasons for deciding constitutional question before determining there was no "plain error").

Leaving this matter to judicial discretion in individual cases does no violence to Article III's case or controversy requirement. Nothing in Article III prevents a court from analyzing the issues presented by a suppression motion in whatever order it deems most appropriate. The essence of Article III is that the judicial power be exercised only in live controversies presenting concrete disputes between adversaries. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). There can be no doubt that a defendant who claims that he has been subjected to an unlawful search or seizure and seeks suppression of the evidentiary fruits thereof raises a live controversy within the Article III authority of federal courts to adjudicate. And, as a matter of logic, it is surely appropriate for a court to decide whether there

---

[61] The courts of appeals routinely exercise similar discretion in applying the harmless error doctrine. Compare, *e.g.*, *United States* v. *West*, 670 F.2d 675, 684-687 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Bulman*, 667 F.2d 1374, 1382-1384 (11th Cir. 1982); *Harryman* v. *Estelle*, 616 F.2d 870, 878 (5th Cir. 1980) (en banc); *United States* v. *Rosales-Lopez*, 617 F.2d 1349, 1355-1356 (9th Cir. 1980), aff'd, 451 U.S. 182 (1981), with, *e.g.*, *United States* v. *McCulley*, 673 F.2d 346, 352 (11th Cir. 1982); *United States* v. *Civella*, 666 F.2d 1122, 1130 (8th Cir. 1981); *United States* v. *Torres*, 659 F.2d 1012, 1013 (9th Cir. 1981), cert. denied, 455 U.S. 926 (1982).

has been a wrong before deciding what remedy to impose. See *Gates*, slip op. 19 n.18 (White, J., concurring).[82]

Finally, as noted by Justice White (*Gates*, slip op. 20 & n.19 (White, J., concurring)), many important Fourth Amendment issues can be resolved in other settings, such as actions for declaratory or injunctive relief brought by persons having a reasonable fear of future exposure to the challenged practice, or damages actions against municipalities under 42 U.S.C. 1983. Accordingly, the fear that Fourth Amendment law will become "frozen" in its current state seems groundless.

4. Finally, both supporters and critics of the exclusionary rule have expressed reluctance about modifying it in the absence of an effective alternative.

---

[82] In *Gates*, Justice White also suggested that the benefits of a new Fourth Amendment ruling might be extended to the party in whose case the rule is first announced (slip op. 21 n.19, citing *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967)). This aspect of *Stovall*, however, has been roundly criticized. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 Va. L. Rev. 1557, 1615 (1975) (footnote omitted):

> Stated bluntly, the "chance beneficiary" notion, developed in *Stovall* and relied on in *Desist* [v. *United States*, 394 U.S. 244 (1969)] and other cases, is not and never was required by article III. Cases in which a new rule is adopted but applied in a wholly prospective fashion are nonetheless decided on the merits. Although with a prospective holding the result in the law-changing case turns on the old rule, not the new one, that fact does not remove the case from the category of an article III case or controversy. If it did, the Court would have acted improperly (indeed, unconstitutionally) in *England* [v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)], *Cipriano* [v. *City of Houma*, 395 U.S. 701 (1969)], and the other cases adopting new rules for purely prospective application.

See, *e.g.*, *Bivens*, 403 U.S. at 415, 420-421 (Burger, C.J., dissenting); Goodpaster, *supra*, 33 Hastings L.J. at 1100; Geller, *supra*, 1975 Wash. U.L.Q. at 688. If the exclusionary rule were actually capable of deterring reasonable police mistakes, this concern would have some force. We have already noted, however, as has the Court (see pages 40-41, *supra*), that there is at most an impressionistic basis for the assumption that the exclusionary rule in fact deters police misconduct. More importantly, in many of the cases to which a reasonable mistake exception would apply, there is no misconduct to deter. Under these circumstances, it simply makes no sense to hold on to a demonstrably costly "remedy" that is incapable of achieving its stated purpose. In our submission, the exclusionary rule must be evaluated on its own merits; if it fails to accomplish its objective, it should be appropriately modified, irrespective of the efficacy of the alternatives that might be substituted.

In any event, a number of alternatives have been suggested. See, *e.g.*, Wilkey, *supra*, 1 Crim. Just. Ethics at 24-26 (suggests executive branch disciplinary boards, civil tort remedies, or "mini-trials" for offending officers following the main criminal trial); Goodpaster, *supra*, 33 Hastings L.J. at 1100-1107 (recommends administrative agency regulation of police conduct). Whether any of these alternatives will be effective cannot be known until they are tested; what should be obvious, however, is that the alternatives cannot possibly be any *less* effective than the exclusionary rule in its current form for cases like the ones now before the Court. Moreover, as has been noted by others, the continued existence of the exclusionary rule may itself actually inhibit experimentation with different approaches by the political branches of government. See *Stone* v. *Powell*, 428

U.S. at 500-501 (Burger, C.J., concurring); *United States* v. *Ross*, 655 F.2d at 1208 (Wilkey, J., dissenting); Schroeder, *supra*, 69 Geo. L.J. at 1385. Accordingly, we submit that the presence of immediately available effective alternatives is simply not a controlling consideration in deciding whether the current rule requires the kind of modification that we propose.

CONCLUSION

The judgments under review should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

KATHRYN A. OBERLY
Assistant to the Solicitor General

ROBERT J. ERICKSON
Attorney

SEPTEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 418383 89

FILED
SEP 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Petitioner.

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A.H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Division
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

Of Counsel:
NEWMAN FLANAGAN,
District Attorney of Suffolk County
MICHAEL J. TRAFT,
Assistant District Attorney

BARNICLE & BLAIR, INC. BOSTON, MASSACHUSETTS

Questions Presented.

Whether the Fourth Amendment to the United States Constitution requires inflexible application of the exclusionary rule when a police officer has reasonably and in good faith relied upon a search warrant to seize items specified in his application for the warrant, but where the warrant is subsequently invalidated for judicial error in failing to specify the items in the warrant itself?

Table of Contents.

Opinion below	1
Jurisdiction	1
Constitutional provisions invoked	2
Prior proceedings	2
Statement of the facts	3
Summary of the argument	8
Argument	10
I. The Fourth Amendment does not require application of the exclusionary rule where a police officer reasonably and in good faith obtains a search warrant which is later invalidated for judicial error	10
A. The exclusionary rule is not constitutionally mandated	10
B. The rationales supporting application of the exclusionary rule do not preclude recognition of a good faith exception	12
C. The exclusionary rule should not be applied where police officers act in a reasonable good faith belief that their conduct comports with the Fourth Amendment	21
II. A good faith exception to application of the exclusionary rule is most appropriate where the search has been conducted pursuant to a warrant	23
III. Applying a totality of the circumstances test, the search and seizure in the instant case was not unreasonable and therefore did not violate the Fourth Amendment	28
Conclusion	32

Table of Authorities Cited.

CASES.

Aguilar v. Texas, 378 U.S. 108 (1964) 29
Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 18n
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 17
Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) 22n
Boyd v. United States, 116 U.S. 616 (1886) 11, 25n
Brinegar v. United States, 338 U.S. 160 (1949) 30
Brown v. Illinois, 422 U.S. 590 (1975) 18, 21, 27
California v. Minjares, 443 U.S. 916 (1979) 21n
Carroll v. United States, 267 U.S. 132 (1925) 30
Commonwealth v. Spofford, 343 Mass. 703 (1962) 10n
Commonwealth v. Wilkins, 243 Mass. 356 (1923) 10n
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 25n, 26, 31
Elkins v. United States, 364 U.S. 206 (1960) 16
Franks v. Delaware, 438 U.S. 154 (1978) 27
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 29
Harlow v. Fitzgerald, ____ U.S. ____, 102 S.Ct. 2727 (1982) 28n
Illinois v. Gates, ____ U.S. ____, 103 S.Ct. 2317 (1983) 16, 21, 23, 25, 29 et seq.
Linkletter v. Walker, 381 U.S. 618 (1965) 13, 14
Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) 26
Ker v. California, 374 U.S. 23 (1963) 29
Mapp v. Ohio, 367 U.S. 643 (1961) 8, 12, 13, 14, 27
Marcus v. Search Warrant, 367 U.S. 717 (1961) 30

Marron v. United States, 275 U.S. 192 (1927) 25n, 29n
Michigan v. DeFillippo, 443 U.S. 31 (1979) 18, 19
Michigan v. Tucker, 417 U.S. 433 (1974) 20
Monell v. Department of Social Services, 436 U.S. 658 (1978) 13n
Owen v. City of Independence, 445 U.S. 622 (1980) 13n
People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537 (1981) 22
People v. DeFore, 242 N.Y. 13 (1926) 27
People v. Pierce, 88 Ill. App. 3d 1095, 411 N.E.2d 295 (1980) 23
Rakas v. Illinois, 439 U.S. 128 (1978) 15, 20
Richmond v. Commonwealth, 50 U.S.L.L. 2162 (Ky. Ct. App. 1981) 23
Roaden v. Kentucky, 413 U.S. 496 (1973) 31
Robbins v. California, 453 U.S. 420 (1981) 31
Shadwick v. City of Tampa, 407 U.S. 345 (1972) 26n
Spinelli v. United States, 393 U.S. 410 (1969) 29
Stanford v. Texas, 379 U.S. 476 (1965) 29n, 30
State v. Lehnen, 403 So.2d 683 (La. 1981) 22
State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981) 22
Stone v. Powell, 428 U.S. 465 (1976) 12, 16, 19, 20n, 21 et seq.
Terry v. Ohio, 392 U.S. 1 (1968) 17
United States v. Calandra, 414 U.S. 338 (1974) 8, 9, 12, 13, 15 et seq.
United States v. Ceccolini, 435 U.S. 268 (1978) 15
United States v. Havens, 446 U.S. 620 (1980) 15
United States v. Janis, 428 U.S. 433 (1976) 15, 16, 20, 21n

United States v. Karathanos, 531 F.2d 26 (2d Cir. 1976), cert. denied, 428 U.S. 910 (1976) 22
United States v. Payner, 447 U.S. 727 (1980) 15, 27
United States v. Peltier, 422 U.S. 531 (1975) 8, 9, 15, 18, 19
United States v. Ross, 456 U.S. 798 (1982) 25, 30
United States v. Shorter, 600 F.2d 585 (6th Cir. 1979) 19n
United States v. Ventresca, 380 U.S. 102 (1965) 24, 31
United States v. Williams, 622 F.2d 830 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981) 22
Weeks v. United States, 232 U.S. 383 (1914) 8, 10, 11, 13, 14
Wolf v. Colorado, 338 U.S. 25 (1949) 11, 12, 13n
Zurcher v. Stanford Daily, 436 U.S. 547 (1978) 31

STATUTES.

United States Constitution
First Amendment 13, 30
Fourth Amendment 2, 8, 9, 10, 11 et seq.
Fifth Amendment 10, 11, 12
Fourteenth Amendment 2, 12, 31
28 U.S.C. § 1257(3) 2
42 U.S.C. § 1983 (1964) 13n
Fed.R.Crim.P. 41(c)(2)(D) 19n
Constitution of the Commonwealth
Declaration of Rights, art. 14 10n
Mass. G.L. c. 276, §§ 1-3A 4
Mass. G.L. c. 276, § 2 10n
Colo. Rev. Stat. Tit. 16, Art. 3, § 308 23n

MISCELLANEOUS.

ALI, Model Code of Pre-Arraignment Procedure § SS290.2(2) (1975) 28n

Exclusionary Rule Bills, Hearings Before the Subcommittee on Criminal Law of the Senate Judiciary Committee, 97th Cong.; 1st and 2d Sessions 23n

National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982) 20n

Oaks, Studying the Exclusionary Rule in Search and Seizures, 37 U. Chi. L. Rev. 665 (1970) 15, 20n

M.R. Wilkey, The exclusionary rule: why suppress valid evidence?, 62 Judicature 215 (1978) 13n

No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Petitioner.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 387 Mass. 488, 441 N.E.2d 725 (1982).

Jurisdiction.

The judgment of the court below was entered on October 26, 1982. The petition for a writ of certiorari was filed on

December 4, 1982, and was granted on June 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions Invoked.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment.

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Prior Proceedings.

On May 14, 1979, Osborne Sheppard was indicted by a Suffolk County grand jury in the Commonwealth of Massachusetts for murder in the first degree (Joint Appendix 8a).[1] Prior to trial, Sheppard moved to suppress certain physical evidence seized pursuant to a search warrant (J.A. 10a). After a pretrial hearing, the court filed a memorandum containing findings of fact and rulings of law denying the motion (J.A. 19a).

---

[1] Hereinafter "J.A."

After trial by jury, the respondent was found guilty of murder in the first degree and sentenced to life imprisonment (J.A. 6a).

On appeal, the Supreme Judicial Court of the Commonwealth reversed the conviction, the plurality holding, "we conclude, on the basis of opinions of the Supreme Court . . . that the exclusionary rule requires the suppression of the evidence seized [pursuant to this defective warrant.] *Commonwealth* v. *Sheppard*, 387 Mass. 488, 507 (1982) (J.A. 59a).

Statement of the Facts.

The facts surrounding the discovery of the body and the investigation which resulted in the police seeking a search warrant are comprehensively set out in the opinion of the Supreme Judicial Court. (387 Mass. at 489-496 (J.A. 41a-48a).) Since the sole issue presented concerns only the application for, issuance of, and execution of a search warrant, and not the establishment of probable cause, reiteration of the facts will be limited to those circumstances.

At the hearing on the motion to suppress, the following facts were elicited: the badly burned and beaten body of the victim, later identified as Sandra Boulware, was discovered in a vacant lot in the Roxbury area of Boston at approximately 5:00 A.M. on Saturday, May 5, 1979 (Tr. 2:170). A length of wire was attached to one leg of the corpse. (Memorandum Containing Findings of Fact and Rulings of Law,[2] J.A. 20a.) Intensive investigation subsequently led to the identification of the victim and to the identification of Osborne "Jimmy" Sheppard as a boyfriend of the deceased (Findings, J.A. 21a). A-

---

[2] Hereinafter "Findings".

police officer who knew Sheppard from prior occasions located him and Sheppard voluntarily accompanied him to the police station. (J.A. 21a.)

After interviewing Sheppard and other individuals whom he had stated he was with from Friday night, May 4, to the early morning hours of May 5, several contradictions in Sheppard's statement appeared (Findings, J.A. 27a). The police then learned that Sheppard had borrowed an automobile between 3:00 A.M. and 5:00 A.M. on May 5, 1979. With the owner's permission, the automobile was inspected and bloodstains were found in the trunk compartment and on the bumper. Strands of wire were also found within the trunk. On Sunday morning the owner told the police that shortly before he let Sheppard use the car he placed a box of apples in the trunk and that there were no stains in the trunk or on the bumper at the time (J.A. 24a). At approximately noontime on Sunday, May 6, 1979, Detective O'Malley prepared an affidavit in support of an application for a search warrant (Tr. 1:38-39 (J.A. 14a)). No courts were open on Sunday afternoon and efforts to locate clerks of the Roxbury District Court were unsuccessful (Tr. 1:64-65; Findings, J.A. 25a). Detective O'Malley's attempts to obtain proper warrant forms from other districts were equally unsuccessful (Tr. 1:55).

Finally, Detective O'Malley was able to obtain a warrant form entitled "Search Warrant" and subtitled "Controlled Substance G.L. c. 276 §§1-3A" from the Dorchester District Court (Tr. 1:39; J.A. 25a). Detective O'Malley, aware that this warrant form related to a search for controlled substances, attempted to adapt the form for the needed use.

With a typewriter he "x"ed out the words "CONTROLLED SUBSTANCES" over the cover side of the form; and the word "DORCHESTER" on the face side and typed in the words

"ROXBURY," so that the application was addressed "To the Justices of the Municipal Court of the ROXBURY DISTRICT."

O'Malley further typed in the name "Osborne Sheppard" where a blank space was afforded for use in identifying the "keeper" or "depositor" of the controlled substance that the form as printed contemplated. O'Malley also typed in "2nd & basement" in a blank space provided for place sought to be searched; also "42 Deckard St." in the blank space provided for specification of the premises (Tr. 1:43; Findings, J.A. 26a).

Arrangements were then made for Detective O'Malley to present the affidavit to a judge of the South Boston District Court at the judge's home. Detective O'Malley, accompanied by other officers and members of the District Attorney's office arrived at the judge's home at approximately 2:45 P.M. (Tr. 1:39, 60, 65; Findings, J.A. 26a).

O'Malley presented the affidavit, swore to its truth, and signed it before the judge (Tr. 1:40-43, 69-70; Findings, J.A. 26a). The affidavit recited the following facts:

> On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Boulware was found beaten and burned to death opp. [*sic*] 28 Hazelwood St. Rox. in a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation that followed, it was determined that one Osborne Sheppard, 42 Deckard St. Rox. was the last person to have been seen with Sandra. In an interview gave [*sic*] to Sgt. Bornstein O. Sheppard stated that he and Sandra went to Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickel bags of herb and a fifth of Amaretto liquor. Officers in this investigation have established that O. Sheppard in possession of a 1975 blk. Ford Thunderbird. Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found.

> And that this article was found to have human blood on the rear bumper that was'nt [*sic*] there prior his taken possession [*sic*]. Also in the trunk of this car were found various pieces of wire and rope that may have been use [*sic*] to bind parts of her body, pieces of wire were found on the body. O. Sheppard has told Mc Kinnley [*sic*] Grimes, a friend, that in the past he has taken woman [*sic*] friends to his celler [*sic*] at 42 Deckard St. for social purposes, and has worked on the cellar to make it comfortable.

(J.A. 14a-15a.)

The affidavit listed as the items sought:

> A fifth bottle of Amaretto liquor, 2 nickle bags marijuana, a womans [*sic*] jacket that has been described as black-grey (charcoal) any possessions of Sandra D. Boulware, similar type wire and rope that match those on the body of Sandra D. Boulware, or in the above Thunderbird. A blunt instrument that might have been used on the victim, mens [*sic*] or womans [*sic*] clothing that may have blood, gasoline, burns on them. Items that may have fingerprints of the victim.

(J.A. 15a.)

Detective O'Malley then explained to the judge the unsuccessful attempts that had been made to locate an appropriate search warrant form. The judge searched in his own library for an appropriate form (Tr. 1:45-46, 55). Detective O'Malley showed the judge the controlled substance search warrant form which O'Malley had attempted to alter to fit the circumstances. The judge examined the proffered form and made

additional alterations to it (Tr. 1:43-44; Findings, J.A. 27a). On the face side of the warrant the judge crossed out with a pen the name of the Chief Justice of the Dorchester Court, which name appeared in the attestation clause and crossed out the printed word "Dorchester" in the clause, and substituted his own name and the name of the court of the jurisdiction in which the warrant was sought ("Mass. Trial Court, Roxbury Division") respectively. On the cover side he struck the words "Dorchester District" and substituted "Roxbury Division Mass. Trial Court," and dated and signed the warrant (Findings, J.A. 27a).

Detective O'Malley also sought and secured a warrant for the arrest of Osborne Sheppard (Tr. 1:47). The team executing the search warrant made a peaceful entry into 42 Deckard Street at approximately 5:00 P.M. Detective O'Malley, carrying the affidavit and search warrant, spoke with two female relatives (apparently the mother and sister) of the defendant. He informed them orally that he had a search warrant and explained that other officers were presently on their way to arrest Osborne Sheppard (Tr. 1:49-50, 97-99; Findings, 28a).

The second floor bedroom of the defendant was searched and bloodstained boots and jacket were seized. (Tr. 9:1234, 1297, 1300, 1315).

Detective O'Malley went to the basement of the house where he observed what appeared to be blood stains on the concrete floor near the doorway which led from the finished to the unfinished area. Under a mat on the floor was a piece of plywood. Under the plywood were two women's earrings, the larger of which appeared to have a blood stain on it. Detective O'Malley chipped off pieces of the stained concrete (Ex. 48A and 48B; Tr. 1:52-54; 8:1072-1081). The detective then entered the unfinished section of the basement. He observed a recent excavation. In the excavation he found a pair of men's jockey shorts, a pair of women's black leotards or panty hose, a

patch of hair which appeared to be part of a hair piece, a piece of tile with a red stain on it and a section of insulated wire (Tr. 1:52; 8:1082-1087, 1091, 1093, 1119). Two other pieces of wire were seized in the unfinished area. An envelope which appeared to have blood stains on it was seized from the finished area of the basement by the pool table (Tr. 8:1088, 1090). The trial judge found that "the search was within the limits that O'Malley understood the warrant to permit" (Findings, J.A. 28a). O'Malley made his return to the Roxbury Court on Monday morning (Findings, J.A. 28a).

Summary of the Argument.

The Fourth Amendment neither directly nor implicitly requires the exclusion of illegally seized evidence from criminal trials. The exclusionary rule was created within the context of flagrant police disregard of Fourth Amendment protections. *Weeks* v. *United States*, 232 U.S. 383 (1914), and *Mapp* v. *Ohio*, 367 U.S. 643 (1961). This Court has consistently re-examined and re-evaluated the rationales originally thought to support application of the rule and found that the sole remaining justification for application of this judicially created remedy is that it may deter improper police conduct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338 (1974) (pp. 10-12).

In defining the scope of the rule, whether to accord it retroactive application or to extend its application beyond the suppression of evidence directly at trial, the Court has developed a balancing test, that is, when the cost of applying the rule is found to outweigh the possible deterrent effect of application of the rule, the rule will not be imposed. See, *e.g.*, *United*

States v. *Peltier*, 422 U.S. 531 (1975); *Calandra*, *supra*, 414 U.S. 338 (1974) (pp. 12-23).

A "reasonable good faith" exception to application of the exclusionary rule under the circumstances of the instant case is consistent with the analytic framework developed by this Court. Application of the rule where, as here, the police in good faith have obtained a search warrant issued by a magistrate after a determination that probable cause exists, can have no deterrent effect for the police have already acted in an objectively reasonable manner. Suppression of evidence solely because of a negligent mistake of the magistrate can not logically be held to have deterrent value. Rather, it offends those principles of proportionality necessary to an orderly system of justice and serves no legitimate function (pp. 23-28).

In the alternative, it is suggested, that where the police obtain a search warrant for which probable cause exists, and where the only defect results from the magistrate's negligent failure to adapt the warrant form to include the items specified by the police in their affidavit, as those to be seized, the search and seizure is not "unreasonable" and therefore no violation of the Fourth Amendment has occurred (pp. 28-32).

Argument.

I. The Fourth Amendment does Not Require Application of the Exclusionary Rule Where a Police Officer Reasonably and in Good Faith Obtains a Search Warrant Which is Later Invalidated for Judicial Error.[3]

A. *The Exclusionary Rule is Not Constitutionally Mandated.*

The Fourth Amendment by its terms neither explicitly nor implicitly requires the exclusion of evidence. Unlike the Fifth Amendment which explicitly prohibits the compulsion of testimony in a criminal case, the text of the Fourth Amendment is conditional. Only unreasonable searches fall within the proscription of the Fourth Amendment and no reference is made concerning any remedy for its violation.

In 1914, this Court in *Weeks* v. *United States*, 232 U.S. 383 (1914), first fashioned the exclusionary rule and applied it to the federal system. *Weeks* involved successive, warrantless searches of a home and seizure of books, letters and personal documents by a federal official.

---

[3] In the court below the Commonwealth argued, and the court considered, the question of whether the exclusionary rule requires suppression of evidence obtained in the course of a search conducted in good faith reliance upon a warrant issued upon probable cause but later invalidated for failure to satisfy the particularity requirement of the Fourth Amendment. The court concluded, "solely on the basis of the opinions of the Supreme Court of the United States" (*Commonwealth* v. *Sheppard* at 489 (J.A. 41a)), that the exclusionary rule required suppression. The decision below is based solely upon the exclusionary rule as enunciated by this Court. Neither art. 14 of the Declaration of Rights of the Constitution of the Commonwealth, nor Mass. Gen. Laws c. 276, § 2 require exclusion of evidence seized in violation of their particularity requirements. See *Commonwealth* v. *Spofford*, 343 Mass. 703 (1962). *Commonwealth* v. *Wilkins*, 243 Mass. 356 (1923).

It is suggested that this Court acted in its supervisory capacity to prohibit the use of illegally seized evidence in a federal court. The rationale for the decision is linked to the Fourth Amendment,

> [T]he protection of the Fourth Amendment declaring [a] right to be secure against such searches and seizures is of no value, and . . . might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

232 U.S. at 393-394.

The Court, however, relied upon *Boyd* v. *United States*, 116 U.S. 616 (1886), in which the Court had struck down a statute requiring a person to produce any document which, in a non-criminal action, might tend to prove a violation of the revenue laws. The Court reached its decision by grouping together the Fourth and Fifth Amendments because "the seizure of a man's private books and papers against him is [not] substantially different from compelling him to be a witness against himself." *Id.* at 633.

In *Wolf* v. *Colorado*, 338 U.S. 25 (1949) the Court held for the first time that the core protection of the Fourth Amendment — "the security of one's privacy against arbitrary intrusion by the police" was "implicit in 'the concept of ordered

liberty' and as such was enforceable against the states through the Due Process Clause" of the Fourteenth Amendment. 338 U.S. at 27-28.

However, the Court did not consider the exclusionary rule so essential to the Fourth Amendment as to require its application in state criminal proceedings. The Court viewed the rule as not derived from explicit requirements of the Fourth Amendment, but rather, to be "a matter of judicial implication." 338 U.S. at 28.

In 1961, the Court reversed that portion of *Wolf*, and extended application of the exclusionary rule to state criminal trials under the Fourteenth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The plurality opinion implied that the exclusionary rule was a necessary corollary of the Fourth Amendment (367 U.S. at 655-657), but Justice Black, concurring, retained the position that the exclusionary rule could be justified only by reading the Fourth Amendment in conjunction with the Fifth Amendment. *Id.* at 661. Recently, this Court has specifically rejected the proposition that the Fourth Amendment mandates exclusion of evidence as a necessary corollary to Fourth Amendment guarantees. "We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right. . . ." *Stone* v. *Powell*, 428 U.S. 465, 495 n.37 (1976). See also *United States* v. *Calandra*, 414 U.S. 338 (1974).

B. *The Rationales Supporting Application of the Exclusionary Rule do Not Preclude Recognition of a Good Faith Exception.*

At the outset it should be noted that the original creation of the exclusionary rule and its first application to the States occurred in cases involving flagrant abuses of not only the Fourth

Amendment but of the First Amendment as well.[4] Of the original three rationales put forth to justify application of an exclusionary rule as a remedy for Fourth Amendment violations, the need to protect the right to privacy, preservation of judicial integrity and deterrence, none, as recently interpreted by this Court, would preclude recognition of a good faith exception to the application of that rule.

1. Right to Privacy.

In *Weeks* and *Mapp*, in the face of flagrant, unlawful, warrantless seizures of personal papers and literature, the Court held that in order to redress an invasion of privacy, evidence must be excluded. *Weeks*, 232 U.S. at 393; *Mapp*, 367 U.S. at 660. However only four years after *Mapp*, the Court, in declining to grant *Mapp* retroactive application, virtually repudiated the privacy right rationale. "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Linkletter* v. *Walker*, 381 U.S. 618, 637 (1965).[5]

In *United States* v. *Calandra*, 414 U.S. 338 (1974), the Court expressly rejected the individual privacy rationale, stating,

---

[4] Indeed, *Mapp* was granted certiorari on the First Amendment issue. The exclusionary rule issue was raised only by amicus curiae in asking the Court to re-examine *Wolf*. *Mapp* v. *Ohio*, 367 U.S. 643, 674 n.5 (Harlan, J., dissenting).

[5] The right to privacy is not an absolute, and falls by the terms of the Fourth Amendment before a reasonable search. Moreover, the exclusionary rule as a remedy for invasion of privacy is totally inadequate as it affords no remedy whatsoever to those innocent persons whose privacy has been invaded. See M.R. Wilkey, The exclusionary rule: why suppress valid evidence?, 62 Judicature 215, 233 n.3 (1978). Those persons have available redress through 42 U.S.C. § 1983 (1964) against individual officers or municipalities whose local ordinances, regulations, policies or customary practices result in the commission of constitutional torts. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). Those entities enjoy no immunity defense. *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

"the rule [was] a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved" 414 U.S. at 348.

2. Judicial Integrity.

The judicial integrity rationale was first clearly stated in *Weeks*:

> [T]he duty of giving [Fourth Amendment protections] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution. . . .

Weeks, 232 U.S. at 392.

This institutional concern with maintaining the purity of the judicial system was also central to the plurality opinion in *Mapp* which viewed application of the exclusionary rule as guaranteeing to the courts "that judicial integrity so necessary to the true administration of justice." *Mapp*, 367 U.S. at 660.[8] However, in *Linkletter*, no mention was made of the judicial integrity rationale as mandating or supporting retroactive application of the exclusionary rule, rather, institutional considerations of the adverse impact on the administration of justice supported the contrary conclusion. *Linkletter* at 637.

---

[8] The plurality opinion also relied heavily on an empirical basis for extending the rule to the States, *i.e.*, that it had proved to be the only effective means of enforcing the Fourth Amendment. *Mapp*, 367 U.S. at 655-660.

Not only has the "imperative of judicial integrity" not served as an independent basis for a decision in any case, (Oaks, Studying the Exclusionary Rule in Search and Seizures, 37 U.Chi.L. Rev. 665, 669 (1970)), the force of this rationale has been eroded by permitting the collateral use of unlawfully seized evidence and use of live evidence derived from an unlawful search. See, *e.g.*, *United States* v. *Havens*, 446 U.S. 620 (1980) (illegally seized evidence may be used for impeachment); *United States* v. *Janis*, 428 U.S. 433 (1976) (evidence illegally seized in a criminal investigation, admissible in civil tax proceeding); *United States* v. *Calandra*, 414 U.S. 338 (1974) (illegally seized evidence admissible in grand jury proceedings); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (live testimony derived from an unconstitutional search is admissible at trial). Were the "judicial integrity" rationale to have been applied in a logically consistent manner, the Court would have been required to prohibit such usage. Consistent application would also require the Court to abandon the threshold standing requirement for invoking the exclusionary rule which was enunciated in *Rakas* v. *Illinois*, 439 U.S. 128 (1978). For, the integrity of the judicial system is not conditioned upon whose rights were infringed, but whether tainted evidence is admitted into evidence. See also *United States* v. *Payner*, 447 U.S. 727, 735 (1980).

To the extent that the "judicial integrity" rationale has continued viability, a good faith exception is not inconsistent. In *United States* v. *Peltier*, 422 U.S. 531, 538 (1975), this Court recognized that the imperative of judicial integrity

> is . . . not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. (Emphasis in original.)

Before exploring the status of the deterrent rationale for the exclusionary rule, two additional comments on the concept of judicial integrity are appropriate. Assuming that the trial of a criminal case is a search for the truth, it is difficult to determine how the integrity of the judiciary is compromised by the admission of inherently reliable evidence. Rather, it is suggested, indiscriminate suppression of reliable, trustworthy and probative evidence may well have the opposite effect of generating disrespect for the law and the judicial system. See *Illinois* v. *Gates*, ___ U.S. ___, 103 S. Ct. 2317, 2342 (1983) (White, J. concurring); *Stone* v. *Powell*, *supra*, 428 U.S. at 490 (Burger, C.J.). In any event, it is suggested that the judicial integrity rationale is fully served by the policy of deterrence.

In *Janis*, *supra*, the Court stated:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

428 U.S. at 458-459 n.35.

3. Deterrence.

The deterrence rationale was succinctly stated in *Elkins* v. *United States*, 364 U.S. 206, 217 (1960): "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guarantee in the only effectively available way — by removing the incentive to disregard it."

However, limitations on the effectiveness of the rule as a deterrent were early recognized. Chief Justice Warren, writing for the Court in *Terry* v. *Ohio*, 392 U.S. 1, 13 (1968), noted:

> The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent.

The Court has continued to acknowledge the limitations of the rule and to balance the costs of deterrence against the integrity of the fact finding process. In his dissenting opinion in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 411 (1971), Chief Justice Burger, in addition to presenting forceful criticisms of the exclusionary rule, drew a distinction between intentional, flagrant conduct and inadvertent errors of judgment as causes of Fourth Amendment violations and lamented the rigid mechanistic application of the exclusionary rule to both. *Bivens* at 418.

This more reasoned balancing approach has been reflected in recent decisions of the Court. In *United States* v. *Calandra*, 414 U.S. 338 (1974), in refusing to extend application of the exclusionary rule to grand jury proceedings, the Court utilized a balancing approach:

> [T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

> Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

414 U.S. at 348 (footnote omitted). See also *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

Continuing to assess the efficacy of the exclusionary rule in deterring Fourth Amendment violations, the Court in *United States* v. *Peltier*, 422 U.S. 531 (1975),[7] stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

Id. at 542.

To have ruled otherwise the Court would have, in substance, told law enforcement that it could not rely on any judicial decision other than those of the Supreme Court. *Id.* at 541-542. Similarly, in *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979), the Court refused to require suppression of evidence seized incident to an arrest pursuant to an ordinance later declared unconstitutional. The Court refused to require that the "prudent officer" anticipate a subsequent judicial determina-

---

[7] The Court declined to grant *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (enunciating new Fourth Amendment standards involving roving border patrol searches) retroactive effect.

tion that the ordinance was unconstitutional. While the decisions in *Peltier* and *DeFillippo* did not actually modify the exclusionary rule, the Court's reasoning does lay the groundwork for such modification.

Within this background, it is suggested that explicit adoption of a good faith exception to the exclusionary rule is entirely consistent with the developing exclusionary rule jurisprudence. A majority of the court has consistently adopted an analytic framework for applying the exclusionary rule which includes consideration of the efficacy of the rule in effectuating its deterrent purpose and the concept of proportionality.[8]

> Application of the [exclusionary] rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Stone v. *Powell*, 428 U.S. 465, 490 (1976) (Burger, C.J., concurring) (footnote omitted).

This Court has also recognized that the cost of applying the rule is substantial. "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept

---

[8] The lack of proportionality often attendant to rigid adherence to the exclusionary rule is striking. See, *e.g.*, *United States* v. *Shorter*, 600 F.2d 585 (6th Cir. 1979) (suppression of evidence of a bank robbery ordered, because the magistrate failed to administer an oath to the affiant "immediately" at the beginning of his telephonic application for a search warrant, as required by Fed. R. Crim. P. 41(c)(2)(D), despite a clear demonstration of probable cause).

from the trier of fact and the search for truth at trial is deflected." *Rakas* v. *Illinois*, *supra*, 439 U.S. at 137.[9]

Assuming that there is, in some situations, a deterrent effect in applying the rule,[10] logic dictates that there would be no effect where the police officer acted in an objectively reasonable belief that his conduct was lawful.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Michigan v. *Tucker*, 417 U.S. 433, 447 (1974). See also *United States* v. *Janis*, 428 U.S. at 459 n.35. ("[T]he officers here were clearly acting in good faith . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion.") Logically, the deterrent value of the

---

[9] A recent California study found that 4.8% of more than 4,000 felony cases were declined for prosecution because of search and seizure problems. Prosecution was declined in approximately 30% of all drug arrests for the same reason. National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).

[10] The statistical data assembled lends no empirical proof to either substantiate or refute the proposition that the rule operates effectively to deter police misconduct. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). The Court has recently noted the absence of any meaningful data. *Janis*, *supra*, 428 U.S. at 449-453; *Stone* v. *Powell*, *supra*, 428 U.S. at 492; *id.* at 498, 499 (Burger, C.J., concurring).

rule would have the greatest effect where police officers acted in conscious disregard of settled principle of law or under circumstances "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring). Given this view of the deterrence rationale it is submitted that the Court should explicitly modify the exclusionary rule.

C. *The Exclusionary Rule Should Not be Applied where Police Officers Act in a Reasonable Good Faith Belief that their Conduct Comports with the Fourth Amendment.*

The Commonwealth urges the Court to adopt the suggestion first made by Justice White in *Stone* v. *Powell*, 428 U.S. at 538 (White, J., dissenting,) that:

> [T]he rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief. . . .

and most strongly urged in concurrence in *Illinois* v. *Gates*, *supra* at 103 S.Ct. 2240. Justice White's proposal is consistent with concerns expressed by other members of the Court.[11]

---

[11] See generally, *Stone* v. *Powell*, *supra*, 428 U.S. at 501 (Burger, C.J., concurring); *Brown* v. *Illinois*, *supra*, 422 U.S. 590, 612 (1974) (Powell, J., concurring in part); *United States* v. *Janis*, 428 U.S. 433, 453 (1976); *California* v. *Minjares*, 443 U.S. 916 (1979) (Rehnquist, J., with Burger, C.J., dissenting from the denial of stay).

The Fifth Circuit has already adopted such an exception, *United States* v. *Williams*, 622 F.2d 830 (5th Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1127 (1981).[18]

In *Williams*, a Drug Enforcement Administration agent arrested an individual that he knew was violating a travel restriction which had been placed upon her when she was released on appeal of another conviction. A subsequent search of her person incident to arrest revealed quantities of heroin. It was later determined that the defendant's violation of the travel restriction did not constitute a crime.

In adopting a reasonable good faith exception, the Fifth Circuit delineated two categories in which the exception was applicable: "good faith mistake," an action under a reasonable factual error, and a good faith "technical violation" in which an officer has reasonably relied upon a statute later declared unconstitutional or a warrant which is later invalidated. *Williams, supra* at 841 and 846. While the Second Circuit has specifically rejected such an exception, *United States* v. *Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 428 U.S. 910 (1976), a number of state courts have also adopted a good faith exception. In *People* v. *Adams*, 53 N.Y. 2d 1, 412 N.E. 2d 537 (1981), the New York Court of Appeals recognized an exception for a good faith reliance upon a consent to search, and emphasized that "the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers. *Id.* at 9. See also *State* v. *Mincey*, 130 Ariz. 389, 636 P.2d 637 (1981) (good faith reliance on the law in Arizona as interpreted by a legal expert); *State* v. *Lehnen*, 403 So. 2d 683, 686 (La. 1981) (material facts, inadvertently but in good faith,

---

[18] Apparently the Eleventh Circuit has also adopted such an exception, *Bonner* v. *Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

omitted from affidavit in support of search warrant); *People* v. *Pierce*, 88 Ill. App. 3d 1095, 411 N.E. 2d 295 (1980) (invalid search warrant, but probable cause and police conduct neither flagrant nor conscious); *Richmond* v. *Commonwealth*, 50 U.S.L.L. 2162 (Ky. Ct. App. 1981) (suppression not required where officers relied in good faith upon a technically defective search warrant).[13]

It is, therefore, suggested that the Court reject the inflexible *per se* application of the exclusionary rule and adopt an objective test which focuses upon the reasonableness of a police officer's conduct in his good faith attept to comply with the standards of the Fourth Amendment.

II. A Good Faith Exception to Application of the Exclusionary Rule is Most Appropriate Where the Search has been Conducted Pursuant to a Warrant.

As noted by Justice White, this Court has "never set forth a rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant. . . ." (*Gates*, 103 S.Ct. at 2344 (White, J., concurring)). One would be hard put to supply one in light of the fact that "once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." *Stone* v. *Powell*, 428 U.S. at 498 (Burger, C.J., concurring).

The Commonwealth, therefore, suggests that modification of the exclusionary rule under the particular circumstances of this case would not only be consistent with recent developments of exclusionary rule jurisprudence, but would also com-

---

[13] Colorado has enacted a good faith exception. Colo. Rev. Stat. Tit. 16, Art. 3, § 308. The United States Congress is considering a similar enactment. See the Exclusionary Rule Bills, Hearings Before the Subcommittee on Criminal Law of the Senate Judiciary Committee, 97th Cong.; 1st and 2d Sessions.

port with the "concept of proportionality essential to the concept of justice." In the instant case, the exclusionary rule has been applied to suppress evidence obtained pursuant to a search warrant. There is no dispute as to the sufficiency of the probable cause to support issuance of the warrant. Thus the strong preference implicit in the Fourth Amendment for searches and seizures conducted pursuant to a warrant issued upon a finding of probable cause has been met. See *United States* v. *Ventresca*, 380 U.S. 102 (1965). The conduct of the police in securing and executing the warrant has been scrupulously examined. The court below specifically found that the police conduct was proper, that they had probable cause to search the premises and that their affidavit adequately set forth that probable cause and specified the items to be seized. The police were advised by the judge that the warrant was adequate to justify the search of the designated premises for the items specified in the application. The search was conducted "in a manner consistent with their good faith belief that a proper warrant had been issued." *Commonwealth* v. *Sheppard* at 503 (J.A. 55a).

> In short, the police conducted the search in a good faith belief, reasonably held, that the search was lawful and authorized by the warrant issued by the judge. The defect in the warrant was not harmful to the defendant in the circumstances of the actual search. The search was conducted in the same way and with the same results as it would have been if the warrant had not been defective. (Footnote omitted.)

Thus, it appears that the police conduct in applying for and executing the warrant was entirely reasonable. "A warrant issued by a magistrate normally suffices to establish" that a

law enforcement officer has "acted in good faith in conducting the search." *United States* v. *Ross*, 456 U.S. 798, 823 n.32 (1982).

The warrant was subsequently invalidated for a technical defect, a negligent error committed by the magistrate in not specifying the items to be seized as required by the particularity requirement of the Fourth Amendment.[14] As suggested by Justice White concurring in *Illinois* v. *Gates*:

> Excluding evidence for these reasons can have no possible deterrent effect on future police conduct, unless it is to make officers less willing to do their duty. Indeed, applying the exclusionary rule to warrant searches may well reduce incentives for police to utilize the preferred warrant procedure when a warrantless search may be permissible under one of the established exceptions to the warrant requirement.

Gates at 2345 (White, J., concurring).[15]

Here, the warrant was invalidated because of an error of the judge. It is quite clear that the exclusionary rule was adopted

---

[14] Petitioner in no sense seeks to minimize the fundamental importance of the particularization requirement: to protect citizens from general warrants and writs of assistance as employed by the British against the colonists. *Boyd* v. *United States*, 116 U.S. 616, 624-627 (1886); *Marron* v. *United States*, 275 U.S. 192, 195-196 (1927). Clearly, it is the intent of the requirement to prohibit "general, exploratory rummaging in a person's belongings." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 467 (1971). However, as the dissent below points out, "none of the evils associated with searches under such warrants occurred." *Sheppard*, at 524 (Lynch, J., dissenting) (J.A. 76a). Nor was such the intent of the law enforcement officials as is objectively reflected by the specificity of their application. The warrant was not a general warrant in fact, it mistakenly but specially authorized a search for controlled substances.

[15] In the instant case, it is arguable that the police could have sought to rely upon the "exigent circumstances" to excuse them from the warrant require-

to deter unlawful searches by police, not mistakes by judges. Application of the exclusionary rule to deter judicial negligence is not compelled by any decision of the Court. This is not a case in which the judge participated in the investigation or execution of the search warrant, (compare *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 326-328 (1979)), or lacked the requisite degree of neutrality, see *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). There is no claim that the issuing judge acted in any but a neutral and impartial manner.[16]

As the court below recognized, in a case involving no intentional misconduct,

> The exclusionary rule may not be well tailored to deterring judicial misconduct. If applied to judicial misconduct, the rule would be just as costly as it is when applied to police misconduct, but it may be ill-fitted to the job-created motivations of judges. As we have said, ideally a judge is impartial as to whether a particular piece of evidence is admitted or a particular defendant convicted. Hence, in the abstract, suppression of a particular piece of evidence may not be as effective a disincentive to a neutral judge as it would be to the police. It may be that a ruling by an appellate court that a search warrant was unconstitutional would be sufficient to deter similar conduct in the future by magistrates. We question, therefore, whether suppression of evidence is neces-

---

ment altogether. The police had a legitimate need to proceed with dispatch, the defendant was at liberty and could reasonably be expected to learn that he was under investigation, the items sought could easily be disposed of, and, it being a Sunday afternoon, a proper warrant form was unobtainable after good faith efforts were made to find one (Findings, J.A. 26a).

[16] The only constitutional requirement is that the issuing official be neutral and capable of assessing probable cause. See *Shadwick* v. *City of Tampa*, 407 U.S. 345, 348-350 (1972).

> sary as a deterrent in cases where the police conduct was entirely proper, the defendant was not prejudiced by the magistrate's error, and an appellate court clearly identifies the magistrate's error of law as a guide to future conduct.

Sheppard at 506 (J.A. 58a).

Suppression of highly relevant, reliable and probative evidence simply because a magistrate, rather than the "constable has blundered" (*People* v. *DeFore*, 242 N.Y. 13, 21 (1926) (Cardozo, J.)), exacts too costly a "toll upon the ability of courts to ascertain the truth in a criminal case." *United States* v. *Payner*, 447 U.S. 727, 734 (1980).

Since application of the exclusionary rule logically can have no deterrent effect either institutionally nor individually where there is no impermissible conduct by the police, there is simply no justification for excluding the evidence.

The good faith exception the Commonwealth requests the Court to establish under the facts of the instant case would not apply, nor does the Commonwealth suggest that it should apply, if the facts relied upon by the magistrate issuing a warrant "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Brown* v. *Illinois*, 422 U.S. at 610-611 (Powell, J., concurring), nor if the material presented to the magistrate was materially false or misleading, *Franks* v. *Delaware*, 438 U.S. 154 (1978). The exclusionary rule would remain applicable to those situations consistent with its historical underpinnings, *i.e.*, "flagrant and egregious" misconduct such as occurred in *Mapp* and *Weeks*.

The exception proposed by the Commonwealth would permit examination of the substantiality of the violation and the

police would still be denied the fruits of intentional or flagrant activity.[17] Examination of the police conduct would not turn on the subjective "good faith" of the officer, but upon the objective reasonableness of his actions.[18]

III. Applying a Totality of the Circumstances Test, the Search and Seizure in the Instant Case was Not Unreasonable and Therefore did Not Violate the Fourth Amendment.

As has been discussed above, and as the lower court acknowledged, the police conduct in conducting the search and seizure was objectively reasonable. The search was deemed to violate the Fourth Amendment because the warrant was technically defective in not satisfying the particularity requirement of the Warrant Clause of the Fourth Amendment.

However, the Amendment by its own terms does not require a finding that failure to meet the particularity requirement renders a search or seizure unconstitutional. The Amendment mandates, by its own terms, only that "unreasonable" searches and seizures are prohibited. This is the core prohibition of the Fourth Amendment. The Amendment further sets requirements for the issuance of a warrant. Warrants which issue, shall issue only "upon probable cause, and supported by Oath and affirmation, and particularly describing the place to be searched and the persons or things to be seized." Although the preference for a warrant is implicit, the Amendment itself

---

[17] This test accords with the ALI's Model Code of Pre-Arraignment Procedure § SS290.2(2) (1975).

[18] The test would be similar in application to the good faith test applied in civil suits brought under 42 U.S.C. of 1983. See *Harlow* v. *Fitzgerald*, ____ U.S. ____, 102 S.Ct. 2727 (1982).

does not define an unreasonable search as one conducted without a warrant. Nor does it require by its terms that a search conducted pursuant to a judicially issued warrant based upon probable cause, but failing to meet the particularity requirement, be deemed unreasonable. It has long been the rule that standards of reasonableness "are not susceptible of Procrustean application." *Ker* v. *California*, 374 U.S. 23, 33 (1963). Rather, "[e]ach case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).

Given that it is the police intrusion which is the fundamental concern of the Fourth Amendment (*United States* v. *Calandra*, 414 U.S. at 345), proper determination of the reasonableness of the search should, it is suggested, focus on the intrusion itself and the proper test to be applied is the "totality of the circumstances" approach as recently enunciated in *Illinois* v. *Gates*, ____ U.S. ____, 103 S.Ct. 2317 (1983).

In *Gates*, this Court rejected the rigid "two-pronged test of *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969) in favor of a "totality of the circumstances" test for determining whether an informant's tip established probable cause for the issuance of a search warrant. Under this approach, it is submitted, the absence from the warrant itself of a particular description of the items to be seized should not, in and of itself, render the search unreasonable. Rather, focus should be had, on the fact that a warrant did in fact issue upon probable cause, supported by oath; that ample probable cause existed to search the particularly described premises, and that ample probable cause existed to support seizure of the items seized.[19] It may indeed be

[19] The latter circumstances go a long way toward dissipating the major concern underlying the particularity requirement, *i.e.*, the colonists' experience with writs of assistance issued on executive, not judicial, authority and unsupported by probable cause. See *Stanford* v. *Texas*, 379 U.S. 476 (1965); *Marron* v. *United States*, 275 U.S. 192 (1927).

that probable cause is a necessary prerequisite to Fourth Amendment reasonableness in the context of most searches. *E.g.*, *Carroll* v. *United States*, 267 U.S. 132 (1925); see also, *Brinegar* v. *United States*, 338 U.S. 160, 175-176 (1949). However, that component has been fully satisfied in the instant case.

In addition, focusing upon the intrusion itself, the search was, in fact, limited to items for which the police had requested authority to search. In approving the validity of a warrantless search of containers in an automobile, the Court reasoned: "The scope of the search was no greater than the magistrate could have authorized . . . [and in the instant case intended to authorize] . . . by issuing a warrant based on the probable cause that justified the search." *United States* v. *Ross*, 456 U.S. 798, 818 (1982).

The warrant in the instant case directed the search of the second floor and basement of 42 Deckard Street. It did not include the items listed in the affidavit but the form did describe drugs and drug paraphernalia (including marihuana, which was listed in the affidavit). Thus, the warrant was not a "general" warrant in the true sense, nor was it a "general" warrant issued upon less than probable cause. The analysis brought to bear in the warrantless automobile and container search cases is analogous.

Moreover, it is not clear that the case law requires that the particularity requirement be accorded "scrupulous exactitude" where the things to be seized do not implicate First Amendment protections. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978). *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

As the Court has acknowledged:

> The Fourth Amendment proscription against "unreasonable . . . seizures," applicable to the States through

> the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 471-472 (1971); *id.*, at 509-510 (Black, J., concurring and dissenting); *id.*, at 512-513 (White, J., concurring and dissenting).

Roaden v. *Kentucky*, 413 U.S. 496, 501 (1973).

Granted that the warrant is defective in failing to specify the seizure of the items listed in the affidavit for which probable cause for seizure had been found, it is submitted that this failure to technically comply with one aspect of the warrant clause does not render the search and seizure unreasonable and violative of the Fourth Amendment when viewed under the "totality of the circumstances." *Illinois* v. *Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983); *United States* v. *Ventresca*, 380 U.S. 102 (1965). This is especially the case where law enforcement was totally unresponsible for the error and took no advantage of it, and where no prejudice accrued to the defendant as a result of the defect. This is not to suggest any diminution in the historical importance of the particularity requirement, but to suggest that a negligent error involving none of the evils the requirement was designed to protect against should automatically render a search and seizure unreasonable and therefore violative of the Fourth Amendment.

Therefore, in the alternative to finding a reasonable good faith exception to the application of the exclusionary rule, the Commonwealth suggests that the Court should grant primacy to Fourth Amendment prohibition against "unreasonable" searches (See *Robbins* v. *California*, 453 U.S. 420, 437-444 (1981) (Rehnquist, J., dissenting) and should find under the

totality of the circumstances no Fourth Amendment violation.

Conclusion.

For the reasons stated above, it is respectfully submitted that the decision of the court below should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A.H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Division
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

Of Counsel:
NEWMAN FLANAGAN,
District Attorney of Suffolk County
MICHAEL J. TRAFT,
Assistant District Attorney

Office - Supreme Court, U.S.
FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-963.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

OSBORNE SHEPPARD,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Respondent.

JOHN REINSTEIN,
Counsel of Record,
Civil Liberties Union of Massachusetts,
47 Winter Street,
Boston, Massachusetts 02108.
(617) 482-3170
NANCY GERTNER,
SILVERGLATE, GERTNER, BAKER & FINE,
88 Broad Street,
Boston, Massachusetts 02110.
(617) 542-6663
Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the United States Constitution compels the conclusion that a warrant which bore no relationship to the serach conducted by the police officers, and which wholly failed to meet the particularity requirement of the constitution, is invalid.

2. Whether the exclusionary rule should apply to evidence obtained under a search warrant that was plainly defective in totally failing to describe the items to be seized under circumstances in which both the issuing judge and the police officers who excecuted the warrant knew that it was defective.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

QUESTIONS PRESENTED.....xiii

PRIOR PROCEEDINGS.....1

STATEMENT OF FACTS.....3

SUMMARY OF ARGUMENT.....13

ARGUMENT.....20

I. THE SEARCH CONDUCTED BY THE BOSTON POLICE PURSUANT TO A WARRANT WHICH FAILED EVEN TO IDENTIFY THE ARTICLES TO BE SEIZED VIOLATED THE FOURTH AMENDMENT.....20

A. The Warrant Authorizing The Search of the Defendant's Home Was Invalid Because It Did Not Particularly Describe The Things To Be Seized.....21

B. A Search Under A Warrant Which Fails To Identify The Things To Be Seized Is Unreasonable Per Se And Cannot Be Remedied By Examination Of The Totality Of The Circumstances.....32

II. THE COURT SHOULD NOT ADOPT A GOOD FAITH OR REASONABLE MISTAKE EXCEPTIONTO THE EXCLUSIONARY RULE...40

A. Nothing in this Court's Precedents Supports the Application of a Cost-Benefit Analysis to th Decision Whether or not to Apply the Exclusionary Rule to the Introduction of Illegally Obtained Evidence in the Government's Case in Chief in a Criminal Trial.....40

B. The Proposed Reasonable Mistake Doctrine Is Unworkable, And Would Effectively Amend The FourthAmendment And Undermine Obedience To Its Commands.....47

1. The proposed exception is ill-defined and ill-conceived, and would legitimize conduct expressly forbidden by the Fourth Amendment.....47

2. The proposed warrant exception would excuse a broad range of warrant errors.....57

3. The "reasonable mistake" and the warrant exception would dismantle the mechanisms of systemic deterrence by freezing Fourth Amendment law and discouraging police training.....66

C. The Reasonable Mistake Exception is Unnecessary: There Is No Cost To The Continuation Of The Exclusionary Rule Beyond The Costs Already Imposed By The Fourth Amendment.....73

III. THE ADOPTION OF A GOOD FAITH OR REASONABLE MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT CHANGE THE OUTCOME IN THIS CASE.....79

A. The Items Seized At The Defendant's Home Should Be Excluded Because The Error In The Warrant Was "Flagrant" And The Warrant Should Never Have Been Issued By The Magistrate.....79

B. The Police Officers Were Not Acting In Good Faith And Did Not Make A Reasonable Mistake In Executing The Warrant.....86

C. The Violation of The Defendant's Fourth Amendment Rights Was Neither Harmless Error Nor Insubstantial.....94

CONCLUSION.....106

TABLE OF AUTHORITIES

Cases:

Aguilar v. Texas, 378 U.S. 108 (1964).....59,84

Alderman v. United States, 394 U.S. 165 (1969).....43

Beck v. Ohio, 379 U.S. 89 (1964).....48

Berger v. New York, 388 U.S. 41 (1967).....69

Brinegar v. United States, 338 U.S. 160 (1949).....75,98

Brown v. Illinois, 422 U.S. 590 (1975).....58,84,87

Brown v. United States, 411 U.S. 223 (1973).....95

Chapman v. California, 386 U.S. 18 (1967).....95

Chimel v. California, 395 U.S. 752 (1969).....39,69

Commonwealth v. Monosson, 351 Mass. 327 (1966).....98

Commonwealth v. Nowells, Mass. S.J.C. No. 3201 (argued Sept. 12, 1983).....3

Commonwealth v. Sheppard, 387 Mass. 488 (1983).....passim

Commonwealth v. Upton, Mass. S.J.C. No. 2941 (argued Sept. 12, 1983).....3

Coolidge v. New Hampshire, 403 U.S. 443 (1971).....22,100

Davis v. United States, 328 U.S. 582 (1946).....38

Delaware v. Prouse, 440 U.S. 648 (1979).....69

Dunaway v. New York, 442 U.S. 200 (1979).....102

Elkins v. United States, 364 U.S. 206 (1960).....66

Frank v. Maryland, 359 U.S. 350 (1959).....22

Franks v. Delaware, 438 U.S. 154 (1978).....59,62,75

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).....24

Fahey v. Connecticut, 375 U.S. 85 (1963).....95

Harringtron v. California, 398 U.S. 250 (1969).....95

Hill v. California, 401 U.S. 797 (1971).....75

Illinois v. Gates, 103 S.Ct. 2317 (1983).....passim

In re Application of Lafayette Academy, 610 F.2d 1 (1st Cir. 1979).....28,31

Johnson v. United States, 333 U.S. 10 (1948).....26

Katz v. United States, 389 U.S. 347 (1967).....30,57,69

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).....23,26,60,84

McDonald v. United States, 335 U.S. 451 (1948).....57

Mapp v. Ohio, 367 U.S. 643 (1961).....51

Marcus v. Search Warrants, 367 U.S. 717 (1961).....22,85

Marron v. United States, 275 U.S. 192 (1927).....23

Michigan v. De Fillippo, 443 U.S. 31 (1979).....50,75

Michigan v. Tucker, 417 U.S. 433 (1974).....87

Milton v. Wainwright, 407 U.S. 371 (1972).....95

Moore v. United States, 461 F.2d 1236 (D.C. Cir. 1972).....28

Nathanson v. United States, 290 U.S. 41 (1933).....59,84

Payton v. New York, 445 U.S. 573 (1980).....44,69

Rochin v. California, 342 U.S. 167 (1951).....51

Schneble v. Florida, 405 U.S. 427 (1972).....95

Schneckloth v. Bustamonte, 412 U.S. 218 (1973).....74

Shadwick v. City of Tampa, 407 U.S. 345 (1972).....82

Silverman v. United States, 365 U.S. 505 (1961).....60

Spinelli v. United States, 393 U.S. 410 (1969).....36,57

Stanford v. Texas, 379 U.S. 476 (1965).....22,26,85

Stone v. Powell, 428 U.S. 465 (1976).....40,42,46,86

Stump v. Sparkman, 435 U.S. 349 (1978).....61

Torres v. Puerto Rico, 442 U.S. 465 (1979).....69

United States v. Abrams, 615 F.2d 541 (1st Cir. 1980).....29,31

United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976).....31

United States v. Calandra, 414 U.S. 338 (1974).....33,40,42

United States v. Chadwick, 433 U.S. 1 (1977).....24

United States v. De LaFuente, 548 F.2d 528 (5th Cir.), cert. denied, 431 U.S. 932 (1977).....57

United States v. Havens, 446 U.S. 620 (1980).....40,43

United States v. Haydel, 649 F.2d 1152 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982).....29

United States v. Janis, 428 U.S. 433 (1976).....40,42,46

United States v. Jeffers, 342 U.S. 48 (1951).....57

United States v. Johnson, 102 S.Ct. 2579 (1982).....passim

United States v. Johnson, 541 F.2d 1311 (8th Cir. 1976).....28

United States v. Klein, 565 F.2d 183 (1st Cir. 1977).....28

United States v. La Monte, 455 F.Supp. 952 (E.D.Pa. 1978).....83

United States v. Marti, 421 F.2d 1263 (2d Cir. 1970), cert. denied, 404 U.S. 947 (1971).....29,31,83,95

United States v. Peltier, 422 U.S. 531 (1975).....50,75,87

United States v. Place, 103 S.Ct. 2637 (1983).....34

United States v. Property Belonging to Talk of the Town Bookstore, 644 F.2d 1317 (9th Cir. 1981).....28

United States v. Rabinowitz, 339 U.S. 56 (1950).....38

United States v. Robinson, 414 U.S. 218 (1973).....74

United States v. Ross, 456 U.S. 798 (1982).....74,102

United States v. Thompson, 495 F.2d 165 (D.C. Cir. 1974).....29

United States v. United States District Court, 407 U.S. 297 (1972).....64

United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981).....47,48,54

United States v. Womack, 509 F.2d 368 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975).....28

United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 104 S.Ct. 69 (1983).....29

Ybarra v. Illinois, 444 U.S. 85 (1980).....34, 69

Constitutional and Statutory Authority:

United States Constitution
Fourth Amendment.....passim

Massachusetts Constitution
Declaration of Rights, art. 14....2, 3

Mass. General Laws c.276, §2.....2, 3

Miscellaneous:

4 W. Blackstone, Commentaries.....55

Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S. Tex.L. Rev. 559 (1982).....78

Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga. L.Rev. 1 (1975).....96

Comptroller General, U.S. General Accounting Office, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979) (Rep. No. GGD 79-45).....77

Davies, Do Criminal Due Process Principles Make a Difference? 1982 Am.B.F.Res.J. 247.....78

T. Davies, What We Know (and Still Need to Learn) About the "Cost" Of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 American Bar Foundation Research Journal (No. 3) (forthcoming).....78

Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind.L.J. 329 (1973).....46

Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027 (1974)....96

W.R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, §4.6 (1978).....28, 29

LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 U.Pitt.L.Rev. 307 (1982).....56,72

Massachusetts Lawyers Weekly Guidebook (1982).....83

Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365 (1981)..... 46,56,63,66,68,72

Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Researrch Journal (No. 3).....78

National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).....78

Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under Fourth and Fifth Amendments, 90 Harv.L.Rev. 945 (1977).....46

Note, The Fourth Amendment Exclusionary Rule: Past, Present and No Future, 12 Am.Crim.L.Rev. 507 (1975)....96,103

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L. Rev. 665 (1970).....46

Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Col. L. Rev. 1365 (1983).....passim

T. Taylor, Two Studies in Constitutional Interpretation (1969).....37-38

R. Van Duizend, L.P. Sutton & C. Carter, The Search Warrant Process: Preconceptions, Perceptions, Practices (Draft Only) (National Center for State Courts, Williamsburg, Va. 1983).....78

No. 82-963

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OSBORNE SHEPPARD,
Respondent

On Writ of Certiorari to the
Supreme Judicial Court for the
Commonwealth of Massachusetts

BRIEF FOR THE RESPONDENT

Prior Proceedings

On May 14, 1979, a grand jury sitting in Suffolk County, Massachusetts returned an indictment charging the respondent, Osborne Sheppard, with murder in the first degree (Joint Appendix 8a). Prior to trial, Sheppard moved to suppress certain physical evidence seized by the police pursuant to a warrant issued by a

judge of the Roxbury District Court (J.A. 10a). After a hearing, the court denied the motion to suppress (J.A. 19a).

At trial, a jury found the defendant guilty of murder in the first degree, and he was sentenced to life imprisonment (J.A. 6a).

On appeal, the Supreme Judicial Court of Massachusetts reversed the defendant's conviction, holding that the warrant violated the constitutional and statutory requirements that search warrants describe with particularity the things to be seized[1] and that "the

---

[1]The court's conclusion was based on the Fourth Amendment, Article XIV of the Declaration of Rights of the Massachusetts Constitution ("special designation of the persons or objects of search, arrest, or seizure"), and the Massachusetts statute governing the issuance of search warrants, Mass. Gen. Laws c. 276, §2 ("Search warrants shall designate the building...to be searched and shall particularly describe the articles to be searched for").

exclusionary rule requires the suppression of the evidence seized pursuant to this defective warrant." Commonwealth v. Sheppard, 387 Mass. 488, 489 (1982)(J.A. 41a).[2]

STATEMENT OF FACTS

In the early morning hours of Saturday, May 5, 1979, the body of a woman, later identified as Sandra B. Boulware, was discovered in a vacant field in the Roxbury section of Boston. It was the tenth of a series of murders of women, most of which had taken place in Roxbury

---

[2]The court did not consider whether the evidence should be suppressed pursuant to the laws of Massachusetts (J.A. 60a). Although the Supreme Judicial Court has never held that Article XIV or M.G.L. c. 276, §2 require suppression of evidence obtained in violation of their provisions, Commonwealth v. Sheppard, supra, that issue has been raised in two cases which are now sub judice in the Massachusetts court. Commonwealth v. Upton, Mass. S.J.C. No. 2941 (argued Sept. 12, 1983), and Commonwealth v. Nowells, Mass. S.J.C. No. 320 1 (argued Sept. 12, 1983).

(Tr. 2:171). The murders had received a great deal of attention from the news media, and there was considerable public interest in the police handling of the cases (Tr. 2:172). The Police Commissioner and the District Attorney were personally involved and both had arrived at the scene of the discovery of the body (Tr. 2:170, 244). Police officers assigned to the case were working overtime from the outset (Tr. 2:172-173).

The investigation soon focused on Osborne Sheppard, who had been seen with the victim four days before her body was discovered. He was brought to the District 2 police station for questioning on Saturday afternoon and was then released.

On Sunday morning, after further investigation, Sergeant Bornstein and Detective O'Malley, the officers in charge

of the investigation, met with the District Attorney at the District 2 police station in Roxbury to discuss the case. They decided at that time to seek a warrant for the arrest of Osborne Sheppard and a warrant authorizing the search of his residence at 42 Deckard Street in Roxbury. Detective O'Malley then prepared an affidavit in support of the application for the warrants. He showed the affidavit to the district attorney and to Paul Buckley, the first assistant district attorney, who reviewed it. The factual recitation in the affidavit stated that:

> I have information based upon (describe sources, facts indicating reliability of source and nature of information; if based on personal knowledge and belief, so state) (if space is insufficient, attach affidavit or affidavits hereto). On Saturday 5/5/79 at 5:00 A.M. the body of Sandra D. Ware was found beaten and burned to death opp. 28 Hazelwood St. rox. In a vacant field. At the time she appeared to be only partially clothed. In the course of the investigation this followed. It was deter-

mined that one Osborne Sheppard 42 Deccard St. Rox. was the last person to have been seen with Sandra. In an interview gave to Sgt. Bornstein, O. Sheppard stated that he and Sandra went to Deckard St. Rox. on 5/1/79, which is the last date she was seen. That prior to going there, they had stopped and bought 2 nickle bags of herb and a fifth of Ameretto liquor. Officers in this investigation had established that O.Sheppard was in possession of a 1975 blk. Ford Thunderbird, Mass. Reg. VLB PNB for a period of time, ending just before the body of Sandra was found and that this vehicle was found to have human blood on the rear bumper that wasn't there prior to his taken possession, also in the trunk of this car were found various pieces of wire and rope that may have been used to bind parts of her body, pieces of wire he found on the body. O. Sheppard has told McKinnley Grimfs, a friend, that in the past he was taken woman friends to his cellar at 42 Deckard St. for social purposes, and has worked on the cellar to make it comfortable.

Based upon the foregoing reliable information - and upon my personal knowledge and belief - and attached affidavits - there is probable cause to believe that property herein after described - has been stolen - or is being concealed, etc. and may be found in the possession of OSBORNE SHEPPARD at premises 2nd floor at 42 Deckard St. Roxbury.

(J.A. 14a-15a)

The warrant application made the following request for authorization to search:

> The property for which I seek the issuance of a search warrant is the following (here describe the property as particularly as possible). A fifth bottle of Ameretto Liquor, 2 nickle bags of marijuana, a womans jacket that has been described as black-grey (charcoal) possessions of Sandra D. Boulware, similar type wire and rope that match on the body of Sandra D. Boulware, or in the above thunder-bird. Blunt instrument that might have been used on the victim.
>
> WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of (identify premises and the person of persons to be searched) The second floor at 42 Deckard St.Rox. and that part of the cellar controlled by Osborne Sheppard. 42 Deckard St. is a three story red brick apartment building with a basement that is attached to yellow & similar structures on both sides. and directing that if such property or evidence or any part thereof be found that it be seized and brought before the court; together with such other and further relief that the court may deem proper.

The police were unable to locate an appropriate search warrant form to present

to the magistrate for his approval. Some attempts were made to locate a clerk of the Roxbury Court, which is adjacent to the police station, and several other police stations were contacted, but these efforts were unavailing (Tr. 1:64-65). Detective O'Malley was able to find a form that had previously been used for drug searches in the jurisdiction of the Dorchester division of the Boston Municipal Court. On the cover of the warrant form, O'Malley crossed out the words "controlled substance," and on the face of the warrant, which is reproduced as an appendix to Justice Liacos' concurring opinion in the Supreme Judicial Court (J.A. 74a), he replaced the word "Dorchester " with the word "Roxbury" and typed in the defendant's address as the place to be searched. The trial court found that O'Malley knew that the warrant

form related to searches for controlled substances and needed to be adapted for use in this case (J.A. 25a), but did not alter the remainder of the warrant form, leaving the reference to controlled substances in the upper portion of the form, which constituted the formal application for the warrant, and in the lower portion, which would constitute the warrant itself.

At approximately 2:45 P.M. on Sunday, May 6, Detective O'Malley, Sergeant Bornstein, another officer, and the first assistant district attorney went to the home of Judge Joseph Feeney to present the application for the warrants (Tr. 1:60, 65). After the judge had reviewed the affidavit and had questioned O'Malley about its substance, they discussed the warrant which the police had prepared. The judge acknowledged that the form was

not appropriate. He searched his library for the proper form, but was unable to find one. He then told the police and the assistant district attorney that he would revise the form which they had brought with them. The judge took the form from Detective O'Malley and, in his presence, made some insignificant changes in the form and then signed it (Tr. 1:43-47).[3]

In fact, the judge made no substantive

---

[3]The judge made only two minor alterations in the form. He crossed out the name of the presiding judge in the Dorchester court and wrote in his own name. He crossed out the reference to the Dorchester Court and wrote in the name of the Roxbury Court (J.A. 27a, 74a). Detective O'Malley testifed that he "observed [the judge] crossing out and writing in words on papers himself" (Tr. 1:47) and thus had the opportunity to see that the judge had not spent any time changing the warrant, that he crossed out only a few words and that he wrote in only a few words. Obviously, he knew or should have known that the judge had not made any significant changes in the form, and the trial judge did not find otherwise.

changes in the form, which authorized the police "to search for any controlled substance, article, implement or other paraphernalia used in, for, or in connection with the unlawful possession or use of any controlled substance." The signed warrant made no reference to the items specified in Detective O'Malley's affidavit, and the affidavit was not attached to the warrant. The warrant was then delivered to O'Malley for execution.[4]

---

[4]The trial judge found that at this point the judge "informed Detective O'Malley that the warrant as delivered over was sufficient authority in form and content to carry out the search as requested" (J.A. 27a), and this finding was apparently relied upon in the plurality opinion of the Supreme Judicial Court in concluding that the police reasonably believed the warrant was adequate. See Commonwealth v. Sheppard, supra, 387 Mass. at 502 (J.A. 54a). There is no evidence in the record that Judge Feeney made any such statements to O'Malley. Detective O'Malley testified only that the judge told him "he would adjust the (cont'd)

Over two hours later, O'Malley and several other police officers went to the defendant's home at 42 Deckard Street. The detective spoke with the defendant's mother and sister, showed them the warrant and entered the house.[5] In the course of the search, the police discovered and seized, among other things, two earrings, several articles of clothing, some wire and a number of items which appeared to be bloodstained. Each of these items was introduced in evidence at the defendant's trial.

(fn. 4 cont'd) ones that we had" (Tr. 1:47). There was no further testimony about the judge's statements to the police.

[5]The trial court made the following finding: "O'Malley orally informed them... that he had a warrant.... There was no evidence that either occupant asked to see it or that it was read spontaneously to them" (J.A. 28a). O'Malley testified, however, that "...we spoke to the defendant's mother and sister and I showed them the search warrant" (Tr. 1:49).

SUMMARY OF ARGUMENT

On May 6, 1979, a group of at least ten police officers entered Osborne Sheppard's home in Roxbury, Massachusetts to search for evidence of a murder. The police were acting under the authority of a warrant which had been issued by a judge of the Roxbury district court and which did not even mention the items which were the objective of the search.

1. There is no question that this search violated the Fourth Amendment because the warrant failed to particularly describe the things to be seized. The absence of such a description is a fundamental constitutional defect in the warrant. When a warrant fails to describe, either explicitly or by reference, the items to be seized, it contains no evidence that the issuing magistrate ever found

probable cause to authorize a search for those items, and it gives no direction to the police to limit their discretion in conducting the search.

The deficiencies of the warrant cannot be excused on the grounds that the search can be viewed as "reasonable" if one considers the "totality of the circumstances." Searches without a warrant particularly describing the things to be seized are per se unreasonable. The "totality of the circumstances" test, which was formulated in Illinois v. Gates, 103 S.Ct. 2317 (1983), for assessing the sufficiency of informant tips in establishing probable cause is not an appropriate standard for measuring compliance with the particularity requirement.

2. Given the clear illegalilty of the warrant, exclusion of the evidence

obtained under its authority is required by the prior decisions of this Court. The court should not accept the petitioner's invitation to carve out a "good faith" or "reasonable mistake" exception to the Fourth Amendment.

There is no precedent for the Government's suggestion that the Court should apply a "cost-benefit" analysis in deciding whether to make an exception to the rule that illegally obtained evidence should be excluded from the prosecution's case-in-chief in a criminal trial. This analysis has been applied heretofore only in considering extensions of the exclusionary rule.

Furthermore, the proposed exception is not only unworkable, it would do major violence to the Fourth Amendment. The "reasonable mistake" standard described in the Brief for the United States is so

broad as to permit almost every illegal search (other than those which are "flagrant," which "shock the conscience," or which are obviously illegal) to escape the sanction of the exclusionary rule. The adoption of such a standard would encourage police officers to conduct a search under circumstances where there is reason to doubt the legality of their actions and would effectively eliminate the requirement of probable cause.

The proposal that unconstitutionally obtained evidence should be admitted in virtually all cases where the police conducted a search pursuant to a warrant would make warrants virtually unreviewable. It ignores the fact that police officers have substantial responsibilities and discretion in applying for and executiing the warrant and would excuse all police errors in

obtaining and executing the warrant. It also ignores the need for effective review of the ex parte decisions made by magistrates.

By permitting the use of illegally obtained evidence in all cases in which the law was not perfectly clear, the proposed exception would remove any incentive for law enforcement officers to be knowledgeable about developments in the law and would reduce both the occasion and the perceived need for articulation of Fourth Amendment principles by the courts.

While the costs of the "reasonable mistake" exception are high, the need for such an exception has not been demonstrated. The government's criticsm of the exclusionary rule is in fact a criticism of the Fourth amendment, and its description of the impact of the

exclusionary rule is greatly overstated.

3. Even if the Court concludes that there should be a "reasonable mistake" exception to the exclusionary rule, the decision in this case should be affirmed. The exception proposed by the government purports not to apply to patently illegal searches where the magistrate had no business issuing the warrant. This is such a case. The error should have been obvious both to the issuing judge and to the police officers. The failure to take notice of the defects of the warrant under circumstances which had alerted them to the problem takes this case out the category of a "reasonable mistake."

The defect in the warrant cannot be overlooked on the grounds that it was "harmless error." This was a flagrant error involving an essential element of

the Fourth Amendment's warrant requirement. The suggestion that the error was meaningless because there was probable cause for the search overlooks the fact that there is nothing in the record which shows that the issuing judge ever made a finding that there was probable cause. Adoption of a "harmless error" test, moreover, would substantially undermine the Fourth Amendment by minimizing its explicit requirements of a warrant and reducing them to mere formalities.

ARGUMENT

I. THE SEARCH CONDUCTED BY THE BOSTON POLICE PURSUANT TO A WARRANT WHICH FAILED EVEN TO IDENTIFY THE ARTICLES TO BE SEIZED VIOLATED THE FOURTH AMENDMENT.

The trial court judge who heard, and denied, the motion to suppress the evidence seized by the police at the defendant's home found that the warrant which was relied upon by the police in this case was "so inappropriate [as] to be plainly unconstitutional" (J.A. 63a). The Supreme Judicial Court of Massachusetts agreed. The plurality opinion concluded that the warrant was defective in that it "failed to describe the items sought to be seized" and therefore "violated the requirements of the Fourth Amendment to the United States Constitution, art. 14 of the Declaration of Rights, and G.L. c. 276, §2." Commonwealth v. Sheppard, supra,

387 Mass. at 499-500, 501 (J.A. 51a-52a, 53a). The concurring opinion of Justices Liacos and Abrams was equally clear that the warrant was invalid because it "had no reference whatsoever to the items sought to be seized, contrary to the requirements of the Fourth Amendment...." Id. at 510 (J.A. 62a). The Massachusetts courts were clearly correct in this respect.

A. The Warrant Authorizing The Search Of The Defendant's Home Was Invalid Because It Did Not Particularly Describe The Things To Be Seized.

The Fourth Amendment to the United States Constitution provides that:

> ...no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The history of the adoption of the Fourth Amendment demonstrates that it was

principally designed to provide protection against general warrants, which gave British officials blanket authority to conduct searches. Stanford v. Texas, 379 U.S. 476, 481-484 (1965); Marcus v. Search Warrants, 367 U.S. 717, 724-729 (1961); Frank v. Maryland, 359 U.S. 350, 363-366 (1959). Thus, one of the "distinct objectives" of the warrant requirement "is that those searches deemed necessary should be as limited as possible. [T]he specific evil is the 'general warrant' abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. ... The warrant accomplishes this objective by requiring a 'particular description of the things to be seized.'" Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971).

This requirement of "particularity" is, as the Court has frequently observed, central to the protection afforded by the Fourth Amendment.

> The requirement that warrants shall particularly describe the things to be seized makes general warrants under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer.

Marron v. United States, 275 U.S. 192, 196 (1927). See also, Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

The particularity requirement imposes limits on both the magistrate who issues the warrant and the police officers who are responsible for executing it. Before issuing a warrant, the magistrate must be satisfied that there is probable cause both to search a particular place and to seize particular objects. The particularity requirement thus prevents "the issuance of warrants on loose, vague

or doubtful bases of fact." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). This determination by the magistrate defines the legitimate scope of the search. The police, in turn, are limited in their conduct of the search to looking for those items which are specifically mentioned in the warrant. The particularity of the warrant also "insures the individual whose property is to be searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." United States v. Chadwick, 433 U.S. 1, 9 (1977).

In this case, the drug warrant issued by Judge Feeney was the sole basis for the authority of the police to enter and search the defendant's home. That warrant simply did not satisfy the particularity requirement. It not only

failed to describe with particularity the items to be seized, it failed to describe them at all. While the application had sought judicial authorization for the seizure of specific evidence which would have linked the defendant with the murder of Sandra Boulware, the warrant actually issued by the magistrate contained only a general authorization to conduct a search for something entirely different: controlled substance.

Because the judge failed to specify in the warrant that the police were authorized to search for the items listed in O'Malley's affidavit, there was nothing to indicate that he had found probable cause to search for any or all of those items.[6] Because the

---

[6]There is no support in the record for the claim that the judge thought he was authorizing the search. See n. 44, infra.

warrant failed to specify which of these items could be seized, the officers who conducted the search were forced to guess which items could properly be taken. The warrant "left it entirely to the discretion of the officials conducting the search to decide what items [could be seized] and to accomplish their seizure." Lo-Ji Sales, Inc. v. New York, supra, 442 U.S. at 325. In so doing, they necessarily substituted their own judgment as to what should be seized for that of the magistrate. This is precisely what the Fourth Amendment forbids. Ibid.; Stanford v. Texas, supra.[7]

---

[7]As Justice Jackson observed in Johnson v. United States, 333 U.S. 10, 13-14 (1946):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denied law enforcement the support of (cont'd)

It is no answer to say that the deficiencies of the warrant were somehow remedied by the more specific language of the affidavit or by the self-imposed restraint of the police officers in conducting the search. First, there was no indication on the face of the warrant that the magistrate intended to authorize the search for which the application had been made. It is a long-established and universally accepted rule that a warrant must incorporate an affidavit by

---

(fn. cont'd) the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

reference and that the affidavit must be physically attached to the warrant in order for the information contained in the affidavit to supplement the terms of the warrant.[8] Neither requirement was met here.

Further, this is not a case in which the terms of the affidavit can be used to clarify an ambiguous warrant or to supplement a sparse but accurate description of the object of the search. The warrant here was simply inaccurate

---

[8]See, e.g., United States v. Property Belonging to Talk of the Town Bookstore, 644 F.2d 1317, 1319 (9th Cir. 1981); In re Application of Lafayette Academy, 610 F.2d 1, 4 (1st Cir. 1979); United States v. Klein, 565 F.2d 183, 186 n.3. (1st Cir. 1977); United States v. Johnson, 541 F.2d 1311, 1315 (8th Cir. 1976); United States v. Womack, 509 F.2d 368, 382 (D.C. Cir. 1974), cert. denied, 422 U.S. 1022 (1975); Moore v. United States, 461 F.2d 1236, 1238 (D.C. Cir. 1972); See also, W.R. La Fave, Search and Seizure: A Treatise on the Fourth Amendment, §4.6 at 100 (1978).

and gave no notice of the items to be seized.[9] As the Supreme Judicial

---

[9]While several lower courts have looked to the language of the affidavit or to knowledge of the police officers in upholding warrants which were ambiguous and therefore deficient in their description of the place to be searched or the things to be seized, it was apparent on the face of the warrant in all of those cases that the magistrate had made a finding of probable cause which was based on the contents of the affidavit. Resort to the language of the affidavit is justified only where the warrant contains an accurate, if sparse or ambiguous, description, and the affidavit merely clarifies what is in the warrant. See, e.g., United States v. Haydel, 649 F.2d 1152, 1157 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982); United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), cert. denied, 104 S.Ct. 69 (1983); United States v. Thompson, 495 F.2d 165 (D.C. Cir. 1974). Where the warrant is facially insufficient rather than ambiguous the particularity requirement has not been satisfied and the warrant must be rejected. See, e.g., United States v. Abrams, 615 F.2d 541, 544 (1st Cir. 1980) (no description in warrant of records to be seized); United States v. Marti, 421 F.2d 1263, 1268-1269 (2d Cir. 1970), cert. denied, 404 U.S. 947 (1971). See also, W.R. La Fave, Search and Seizure: A Treatise on the Fourth Amendment, supra, §4.6 at 101.

Court noted in distinguishing the present case from a prior decision upholding a search conducted pursuant to a warrant which contained a partial misdescription of the place to be searched, "[t]he case before us is not, of course, ...one in which the search warrant was ambiguous." 387 Mass. at 498 n.9 (J.A. 50a).

Finally, the restraint of the police officers in conducting the search does not alter the fact that the warrant which authorized it was invalid. As this Court observed in Katz v. United States, 389 U.S. 347, 356 (1967), in rejecting precisely this argument:

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer.... They were not compelled, during the conduct of the search itself to observe precise limits established in advance by a specific court order.... In the absence of such safeguards, this court has never sustained a search upon the ground

> that the officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.[10]

The police executing the warrant to search Sheppard's home likewise had no "limits established in advance by a specific court order" to control their conduct. The limits of the search were set by their understanding of what the application prepared by Detective O'Malley would have justified had it been granted in its entirety. Even assuming that this understanding was correct, that the search actually conducted by the police did not exceed the limits of the

---

[10] See also, United States v. Abrams, supra, 615 F.2d at 544; In re Application of Lafayette Academy, supra, 610 F.2d at 5; United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); United States v. Marti, supra, 421 F.2d at 1269.

application and that probable cause existed, the search nevertheless violates the Fourth Amendment because it was done pursuant to a patently invalid warrant.

B. A Search Under A Warrant Which Fails To Identify The Things To Be Seized Is Unreasonable Per Se And Cannot Be Remedied By Examination Of The Totality Of The Circumstances.

Acknowledging that the warrant in this action was defective, the state contends that the search was nonetheless "reasonable" when one looks at the totality of the circumstances, and therefore did not violate the Fourth Amendment. The acceptance of this position would be a radical and unprecedented departure from settled Fourth Amendment principles. The state's argument is that (1) under the Fourth Amendment a search conducted pursuant to a warrant that fails to meet the

particularity requirement is not necessarily unreasonable, and (2) accordingly, the Court should apply the totality of the circumstances test articulated in Illinois v. Gates, 103 S.Ct. 2317, 2327-2328 (1983), focusing on the nature of the police intrusion,[11] to determine whether a search conducted pursuant to a defective warrant is reasonable within the meaning of the Fourth Amendment. Brief for the Petitioner at 29. This argument is defective and should be rejected for

---

[11]The state contends that police intrusion is the "fundamental concern of the Fourth Amendment." Brief for the Petitioner at 29, citing United States v. Calandra, 414 U.S. 338, 347 (1974). Calandra did not reduce the Fourth Amendment to a rule against police misconduct. The focus of the discussion in Calandra was the exclusionary rule, and nothing in that opinion suggests that the Fourth Amendment's procedural guarantees have been narrowed in the manner suggested by the state.

several reasons.

First, the state's major premise for this argument misstates the law. It is now beyond dispute that a seizure of personal property is "per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." United States v. Place, 103 S.Ct. 2637, 2641 (1983).; Ybarra v. Illinois, 444 U.S. 85, 101-102 (1979).

Second, the "totality of the circumstances" test of Illinois v. Gates, supra, has no applicability here. The issue in Gates was whether the Court should modify the two-prong test for judging the sufficiency of information obtained from an informant in establishing the existence of probable

cause for the issuance of a search warrant. The Court held that the inquiry of the magistrate into the "veracity" or "reliability" of the informant and the "basis of knowledge" for the information provided to the police should not be "understood as entirely separate and independent requirements to be rigidly exacted in every case" but as "closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause'" and that "a deficiency in one may be compensated for, in determining the overall reliability of the tip, by a strong showing as to the other...." Id. at 2327-2329. This flexibility in the assessment of information obtained from an informant was deemed necessary because "probable cause is a fluid concept--turning on the assessment of

probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." Id. at 2328. The two-prong test of Spinelli v. United States, 393 U.S. 410 (1969), was abandoned because it had "encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from other facts presented to the magistrate." Illinois v. Gates, supra, 103 S.Ct. at 2330 (footnote omitted).

Unlike the determination of probable cause which was the focus of the Court's attention in Gates, particularity of description in a warrant is not a "fluid concept." To the contrary, it is specifically required by the language of the Fourth Amendment and is essential to its proper operation. Indeed, it is

precisely because probable cause is such a fluid concept that the Fourth Amendment's requirement of a warrant particularly describing "the things to be seized" takes on such significance.

Compression of the discrete requirements of probable cause and of a warrant particularly describing the things to be seized into a single test of "reasonableness" is inconsistent with the historical purpose of the Fourth Amendment. The Fourth Amendment was foremost a response to the colonial experience with the writs of assistance and general warrants. It has been noted that:

> [O]ur constitutional fathers were not concerned about warrantless searches but about overreaching warrants.... Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches.

T. Taylor, Two Studies in Constitutional

Interpretation 41 (1969). The warrant requirement, with its specific elements of probable cause and particularity, was intended to insure that any warrant issued would be "exacting in its foundation and limited in scope," Davis v. United States, 328 U.S. 582, 605 (1948) (Frankfurter, J., dissenting), so as to prevent "unreasonable and oppressive searches." The state would have the Court disregard this history and reduce the review of searches to a post hoc consideration of their reasonableness. As Justice Frankfurter wrote over thirty years ago:

> One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

The standard proposed by the state also seeks to work a fundamental change in the Fourth Amendment. In minimizing the role of the warrant requirement, the state would postpone consideration of the legality of the search until after it has taken place. This, however, ignores the fact that the Fourth Amendment "is designed to prevent, not simply to redress, unlawful police action." Chimel v. California, 395 U.S. 752, 766 n.12 (1969).

II. THE COURT SHOULD NOT ADOPT A GOOD FAITH OR REASONABLE MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE.

A. Nothing in this Court's Precedents Supports the Application of a Cost-Benefit Analysis to the Decision Whether or not to Apply the Exclusionary Rule to the Introduction of Illegally Obtained Evidence in the Government's Case in Chief in a Criminal Trial.

The Government[12] contends that its proposal for a "reasonable mistake exception" in all criminal cases for all purposes is supported by United States v. Calandra, supra, 414 U.S. 351, Stone v. Powell, 428 U.S. 465 (1976), United States v. Janis, 428 U.S. 433 (1976), and United States v. Havens, 446 U.S. 620 (1980). The analysis goes as follows: First, the exclusionary rule is "merely" a judge-made rule of evidence, Brief for

---

[12]In this section, we are responding to the arguments advanced in the Brief for the United States. The term "the Government" refers to the United States unless othewise noted.

the United States at 31, whose primary purpose is the deterrence of police misconduct. Id. at 33. Second, this Court has imposed a "cost-benefit" analysis when it has confronted "expansions" of the rule or "has examined afresh the propriety of certain applications of the rule." Id. at 35. Third, the costs of the rule will always outweigh the benefits in any situation in which a reasonably well-trained officer would not recognize the search to be unlawful or in which a search is conducted pursuant to a warrant. Id. at 57.

The government's analysis is wrong as a matter both of precedent and of policy. The cases upon which its cost-benefit approach is predicated were all premised on the assumption that unconstitutionally obtained evidence

will be excluded from the prosecution's case in chief. If that premise is undercut, as the government proposes, then the logic behind such decisions as Stone and Calandra disintegrates.

Thus, in Calandra, where the Court declined to apply the exclusionary rule to grand jury questions based upon illegally seized evidence, it declared: "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best." 414 U.S. at 351 (emphasis added). In Stone, the Court likewise reasoned in terms of the "incremental," "additional," or "marginal" deterrent effect of permitting habeas corpus petitioners to litigate exclusionary rule claims in collateral proceedings. 428 U.S. at 487-495. In Janis, the Court recognized

that the infrequency of the use of illegally seized evidence in civil trials renders exclusion in that context of limited deterrent value. 428 U.S. at 454. See also, United States v. Havens, 446 U.S. 620, 627-628 (1980); Alderman v. United States, 394 U.S. 165, 175 (1969).

The Government also argues that this Court's decisions on the retroactivity of constitutional principles employ the "same balancing analysis" that it claims supports its proposal for replacing the exclusionary rule with an ad hoc cost-benefit analysis. Brief for the United States at 37. In so concluding, the government relegates this Court's most recent retroactivity decision, United States v. Johnson, 102 S.Ct. 2579 (1982) to the obscurity of a footnote.[13]

---

[13]The Government describes (cont'd)

But in Johnson this Court held that Payton v. New York, 445 U.S. 573 (1980), should be applied retroactively to all cases not final at the time of the decision. Because Payton clarified an area that had been left unsettled, the Court declined to balance cost and

---

(fn. cont'd) Johnson as a case which reflects the Court's concern with according "fundamental fairness for persons similarly situated rather than any general retreat from the balancing analysis the Court has consistently employed in the context of the exclusionary rule." Brief for the United States at 37. The decision in Johnson, however, expressly criticizes previous rulings of the Court dealing with retroactivity, and particularly those cases in which a balancing approach had led to the "selective award" of retroactivity to litigants who happened to make it to the Supreme Court first. With respect to retroactivity of Fourth Amendment law, the Court specifically criticized the "balance" which the Government now urges, that in "unsettled" areas of the law decisions should not be made retroactive because any mistake which the searching official made must be described as "reasonable." 102 S.Ct. at 2593.

benefit in the fashion urged here by the Government.[14] Whereas a cost-benefit analysis may be applied to cases representing a "clear break" with prior precedent, it cannot be applied to an area in which the law was unsettled. Johnson, supra, 102 S.Ct. at 2586-2588, 2592-2593.

These precedents show that the Court has exercised discretion to balance the cost and benefit of the exclusionary rule only at the periphery. At the

---

[14]The Court in Johnson noted: "Because this Court cannot rule on every unsettled Fourth Amendment question, years may pass before the Court finally invalidates a police practice of dubious constitutionality....Furthermore, the court's opinions consistently had emphasized that, in light of the constititutional protection traditionally accorded the privacy of the home, police officers should resolve any doubts regarding the validity of a home arrest in favor of obtaining a warrant...." 102 S.Ct. at 2593.

core--the use of illegally obtained evidence against a defendant in the Government's case in chief--the Framers' balance is, and must be, undisturbed.[15]

---

[15]A cost-benefit approach makes no sense when individual rights--and particularly Fourth Amendment privacy rights--are concerned. There is no way to measure whether or not deterrence is successful, i.e., how many illegal searches have been deterred. The benefit to the citizenry of personal privacy is inchoate and unmeasurable. Stone v. Powell, supra, 428 U.S. at 492 n.32; United States v. Janis, supra, 428 U.S. at 450-51 n.22-26.

See also, Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under Fourth and Fifth Amendments, 90 Harv.L.Rev. 945, 983 n.235 (1977); Dworkin, Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering, 48 Ind.L.J. 329, 323-33 (1973); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 386 n.33, 387 n.34 (1981); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665, 678 (1970).

Former Justice Stewart also takes the position that a cost-benefit approach is inappropriate to the (cont'd)

B. The Proposed Reasonable Mistake Doctrine Is Unworkable, And Would Effectively Amend The Fourth Amendment And Undermine Obedience To Its Commands.

(1) The proposed exception is ill-defined and ill-conceived, and would legitimize conduct expressly forbidden by the Fourth Amendment.

The Solicitor General proposes a test with both a subjective and an objective component.[16] The test

---

(fn. cont'd) Fourth Amendment. The exclusionary rule, according to Justice Stewart, is not just another judge-made remedy, as Justice White suggests in Gates, 103 S.Ct. at 2342, but a constitutionally-mandated remedy. Since the responsibility for enforcing the Amendment rests on the judiciary, it may be necessary for the judiciary to remove the incentive for its violation. The question is whether there should be exclusion, or whether there are other remedies adequate to the task. He, like many other commentators, concludes that there are not. Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Col.L.Rev. 1365, 1384 (1983).

[16]Brief for the United States at 78 quoting United States v. Williams, 622 F.2d 830, 841 n.4 (cont'd)

is founded on the officer's belief that his conduct is not unlawful, but in light of criticisms levelled against a subjective good faith exception, [17] the Government then attempts to limit the application of the exception to those cases in which the officer's belief would be labelled objectively reasonable. However, the Government sees such a broad range of conduct as objectively reasonable that the limitation is virtually meaningless.[18]

(fn. cont'd) (5th Cir. 1980)(en banc), cert. denied, 449 U.S. 1127 (1981), ("we emphasize that the belief, in addition to being held in subjective good faith, must be grounded in an objective reasonableness."). See also, Illinois v. Gates, 103 S.Ct. at 2346 (White, J. concurring).

[17] See Brief for the United States, at 78-80. See also, Beck v. Ohio, 379 U.S. 89 (1964).

[18] The Government's proposal not only alters the test for determining the application of the exclusionary (cont'd)

The Solicitor General describes a "spectrum" of Fourth Amendment violations, from the "flagrant," in which deterrence is said to be most effective, to the "technical," in which it is said to be least effective. Brief for the United States at 44-45.

On the "flagrant" end are those situations in which the police officer knew or should have known that his conduct violated the norms of the Fourth Amendment. On the other end are those situations in which the police officer

---

(fn. cont'd) rule; it appears to suggest a complete reversal of the burden of proof. The new rule would be that illegally obtained evidence is admissible. The exception--which the defendant would have to establish--would be its exclusion. Brief for the United States at 38-39. While the Government continues to label its proposal an "exception," its analysis appears to go much further. This burden shifting would effect a major change in Fourth Amendment law.

and indeed, his department, could not possibly have known of the applicable principles because they changed dramatically after the search, and thus, the officer's conduct would not be subject to an exclusionary rule. Under the present law the latter situation is not a violation of the Fourth Amendment.[19] In between these extremes is the realm of "reasonable mistake."

The breadth of the exception obviously depends upon what is meant by "flagrant". For the most part, the Government shrinks from defining flagrant with any precision and would leave it to the lower courts to

---

[19] See, Michigan v. DeFillippo, 443 U.S. 31 (1979) (substantive law governing the arrest later declared unconstitutional); United States v. Peltier, 422 U.S. 531 (1975) (law with respect to border searches reversed).

articulate the appropriate standards on a case by case basis. Id. at 48. Were this Court to adopt such an approach it would send a message to police officers that they may act first and take their chances that their actions will later be deemed reasonable. See United States v. Johnson, supra, 102 S.Ct. at 2593-94.

The Government suggests that flagrant violations are simply violations of well-settled principles.[20] Id. at

---

[20]At times the Government appears to be defining "flagrant" in an historical fashion, referring to the time when the exclusionary rule was only applied to "arrogant" or "brazen" behavior or "egregious misconduct." Id. at 56. Such an interpretation may very well return Fourth Amendment jurisprudence to the law pre-Mapp v. Ohio, supra, 367 U.S. 643, when the only conduct clearly subject to exclusion in the state courts was that condemned in Rochin v. California, 342 U.S. 165 (1952), namely, conduct that "shocks the conscience." In effect, the lines between the Fourth Amendment and the due process clause of the Fifth Amendment would once again become obfuscated.

44. In the areas where principles are anything less than "well-settled," illegal searches presumably would be tolerated. These areas may well include instances in which the Court was less than precise in articulating constitutional principles,[21] or situations in which there is a conflict in the circuits, or between a district

---

[21]As Justice Stewart notes: "The occupation of a judge requires application of the Fourth Amendment's sweeping language to cases presenting the infinite variety of factual situations that arise in real life. The art of being a judge, if there is such an art, is in announcing clear rules in the context of these infinitely varied cases, rules that can be understood and observed by conscientious government officials. If the outcome of fourth amendment cases has come to be regarded as turning on 'technicalities,' it is in part because of the inevitable human shortcomings of judges faced with the task of articulating fourth amendment principles applicable in a broad range of situations while doing justice in a particular case. Most justices do their best, but that is not always good enough." Stewart, supra, 83 Col.L.Rev. at 1393.

court and courts of appeal, or where the issue is before this Court.[22]

Indeed, the Solicitor General offers the exception precisely to encourage the police to search when the law is "unsettled." The Government decries the fact that the excusionary rule "chills" officers from acting when a particular search is "closer to the indistinct line often separating lawful from unlawful searches and seizures," where the search in question is as likely to be lawful as

---

[22]The Government suggests that since such imprecision occurs all too often, police officers "will neither know the scope of their authority" nor be sufficiently deterred from improper action to justify the continuation of the rule. Id. at 50. That description more accurately predicts the state of the law if the Government's exception is erected. With an open-ended reasonable mistake doctrine, the police will have no idea when unlawful conduct will be excused and when it will be punished.

unlawful. Id. at 73.[23] The short answer is that these situations are precisely the ones in which the Fourth Amendment exhorts police officers not to search. The Fourth Amendment encourages officers to err on the side of restraint, to impinge on privacy only when the level of certainty described in the probable cause standard is met.[24]

---

[23]The Government would excuse the officers' conduct in United States v. Williams, supra, 622 F.2d 830, because "[s]ociety expects the police to act in such situations, and it cannot seriously be urged that society is benefitted, or that individual constitutional liberties are meaningfully advanced, by a rule of law that causes an officer to doubt the propriety of taking action when he observes what he reasonably believes to be an offense in progress." Id. at 48. Regardless of what "society believes," the Fourth Amendment prohibits such behavior where the officer is speculating about the scope of his arrest powers. See United States v. Johnson, supra, at 2594.

[24]Indeed, the decision to err on the side of caution and restraint is central to Anglo-American (cont'd)

See, United States v. Johnson, supra, 102 S.Ct. at 2593, 2594. Where the situation is ambiguous or the law unclear, he is not permitted to act.

Since, as the Government admits, it is so difficult to prove what is in an officer's mind, the exception may well encourage officers not only to act when they are uncertain but even when they in fact understand the law, using imprecise draftsmanship, or a less than unanimous decision, as an excuse. The officer need no longer ask whether the circumstances establish probable cause. He need only ask whether or not he has a reasonable excuse for thinking that

---

(fn. cont'd) jurisprudence even if it means that unlawful searches are sometimes deterred or the guilty escape punishment. In effect, that is the meaning of the statement: "It is better that ten guilty persons escape than one innocent suffer." 4 W. Blackstone, Commentaries, ch. 27.

there was probable cause. If the answer to the second question is yes, he will search even if he knows that there is no probable cause. Mertens, & Wasserstrom, supra, 70 Geo. L.J. at 455; Stewart, supra, 83 Col. L.Rev. at 1402; LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U.Pitt.L.Rev. 307, 352 (1982).

2. The proposed warrant exception would excuse a broad range of warrant errors.

Under present law, where the defendant challenges a warrant search, he bears the burden of proof.[25] Where the claimed error is the lack of probable cause, the magistrate's findings must be accorded "due deference." Illinois v. Gates, supra, 103 S.Ct. at 2332-2332; Spinelli v. United States, 393 U.S. 410, 419 (1969). In the case of other warrant errors, like the failure to comply with the particularity requirements, the reviewing courts will exercise greater

---

[25]In a warrantless search, the burden of proof is on the Government, while in a warrant search, it is the reverse. Katz v. United States, supra, 389 U.S. at 357; McDonald v. United States, 335 U.S. 451, 456 (1948); United States v. Jeffers, 342 U.S. 48, 51 (1951). See also, United States v. De LaFuente, 548 F.2d 528, 534 (5th Cir.), cert. denied, 431 U.S. 932 (1977).

scrutiny.

The proposed warrant exception would excuse a far broader range of warrant errors than does the existing law. It would establish a nearly irrebuttable presumption that the warrant is adequate. The only situations subject to the sanction of exclusion would be those in which there has been "flagrant abuse," Brief for the United States at 65, but "flagrant" is again undefined. The Government says only that situations in which warrant violations would be considered flagrant include those in which the factors relied upon by the magistrate "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," id. at 65, citing Brown v. Illinois, supra, 422 U.S. at 610-611 (Powell J. concurring), or in which the

warrant was procured in bad faith or on the basis of material misrepresentations. Ibid., citing Franks v. Delaware, 438 U.S. 154 (1978).[26]

The warrant errors that would be tolerated include more than errors in determinations of probable cause.[27]

---

[26]"Flagrant" in this context is even narrower than the concept of "well settled principles." After Gates v. Illinois, supra, flagrant may well include only those situations in which warrants like those in Nathanson v. United States, 290 U.S. 41 (1933), or Aguilar v. Texas, 378 U.S. 108 (1964), are reviewed. In light of the more flexible standard approved in Gates, it is all the more important to preserve independent review of the warrant process. To adopt a Gates standard and to insulate warrants from judicial review would effectively take the Court out of the business of enforcing the Fourth Amendment. See Stewart, supra 83 Col.L.Rev. at 1397. See also, Illinois v. Gates, supra, 103 S.Ct. at 2350-2351 (White J., concurring).

[27]It should be noted that electronic surveillance would fall completely into the warrant exception. There can be no doubt that this area is one in which judicial scrutiny is (cont'd)

There might well be no exclusion if the officer fails to describe the place to be searched or the items seized with sufficient particularity to satisfy the constitutional standard, or if the officer executes a patently imprecise or defective warrant without bothering to read it--as in Sheppard. Indeed, under the Government's scheme evidence would not be excluded even if the warrant were fundamentally tainted by the fact that the magistrate acted improperly, such as conducting his own investigation, as in Lo-Ji Sales, Inc. v. New York, supra.[28] An exception of this

---

(fn. cont'd) most important since the potential for abuse is great. See, e.g., Silverman v. United States, 365 U.S. 505, 509 (1961).

[28]Finally, the warrant exception would leave the individual aggrieved by an illegal search without a remedy, either criminal or civil. The warrant itself makes the police officer (cont'd)

breadth cannot be justified. The Government argues that police errors pursuant to a warrant should not trigger the exclusionary rule because the police have done all that can be expected of them once they have secured a warrant. Brief for the United States at 61. It also argues that the exclusionary rule should not be applied to magistrate errors since magistrates who are not part of the "law enforcement team" are not deterred by the exclusion of evidence. Id. at 59.

This argument substantially understates the responsibilities of police officers in the warrant process, suggesting that all that is required of the officer is that he obtain a

---

(fn. cont'd) immune from suit. At the same time, judicial immunity leaves the magistrate invulnerable. Stump v. Sparkman, 435 U.S. 349 (1978).

warrant. A police officer is not entitled to take a warrant at face value under all circumstances. He may not rely on a warrant which he has obtained by means of knowingly or recklessly false statements. Franks v. Delaware, 438 U.S. 154 (1978). Likewise, in executing the warrant, he cannot reasonably rely on a warrant which he knows to authorize a search for items which were not mentioned the application. The police officer is not expected to forget the statements he made in obtaining the warrant when the time comes for him to execute it. Moreover, where he does execute the warrant, the police officer is required to read it to observe the limits which it sets on the scope of the search. A rule which lifts all responsibility for errors from police shoulders would

encourage police officer carelessness. Moreover, since the warrant would be virtually unreviewable, officers would have every incentive to go "magistrate shopping." Mertens, & Wasserstrom, 70 supra, 70 GeoL.J. at 456.

The Government also misperceives the role of the magistrate. Although the magistrate is more removed from pressures of criminal investigation, the warrant process remains a quick, ex parte proceeding. There are compelling reasons for the courts, and particularly this Court, to review and to act on errors committed by a magistrate. As Justice Liacos observed in his concurring opinion inthe Supreme Judicial Court:

> The plurality opinion appears to recognize that suppression of illegally seized evidence may encourage greater care by magistrates in the future, but expresses doubt as to the efficacy

> of such a rule in deterring judicial error. I strongly disagree. Our responsibility as the court of last resort in this Commonwealth requires that judicial violations of the Fourth Amendment find no sanction, express or implied, in our opinions. Unless this court "safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." United States v. United States District Court, 407 U.S. 297, 312 (1972). The language in today's opinion will hardly encourage greater care by judges who issue search warrants. Indeed, the language of the plurality cannot but encourage negligent behavior, a hardly laudable characteristic of judicial conduct. Common sense tells me that greater care will be encouraged if the rule remains as it is, viz., evidence seized under an invalid warrant will be suppressed.

387 Mass. at 514 (J.A. 66a).

Finally, if the courts do not carefully review the magistrate's handiwork, he has no means of knowing what he did right or wrong. While the Government maintains that a court could admit evidence obtained through a

warrant, and at the same time declare that the warrant violated the Fourth Amendment that is unlikely.[29] If it did issue such an advisory opinion, some time after the warrant had been issued, the magistrate would still have little incentive to refrain from repeating the same mistake or from granting any colorable request for a warrant. Stewart, supra, 83 Col.L.Rev. at 1403. The message conveyed to magistrates would be that whatever errors they made, they are not severe enough to trigger the "flagrant" standard. Given the pressures of a criminal investigation, even at the level of a magistrate, the exception would promote carelessness.

---

[29]See Section B(3).

3. The "reasonable mistake" and the warrant exception would dismantle the mechanisms of systemic deterrence by freezing Fourth Amendment law and discouraging police training.

The "reasonable mistake" doctrine is premised on a concept of individual deterrence which has never been accepted by this Court. See Elkins v. United States, 364 U.S. 206, 217 (1960). This theory holds that the exclusionary rule operates on the individual police officer to whom it is applied, by imposing sanctions on his noncompliance. However, as several commentators have suggested, the exclusionary rule affects police conduct through systemic deterrence. Mertens & Wasserstrom, supra, 70 Geo. L.J. at 399; Stewart, supra, 83 Col.L.Rev. at 1400. It encourages the courts to exmaine police conduct and articulate the constitutional standards in the light of

modern police techniques and situations. These pronouncements, coupled with the sanction of exclusion, provide the guidelines and the incentive for law enforcement agencies then to train officers to comply with the Fourth Amendment.

The reasonable mistake doctrine would dismantle this system at both ends: the development of Fourth Amendment law, and police training. In the area of legal principles, the exception would allow--indeed, encourage--courts to avoid deciding underlying substantive issues (for example, whether or not there was probable cause) in favor of deciding only questions of remedy (whether or not there was a reasonable excuse for thinking that there was probable cause). While the Government maintains

that courts could decide liability before they address remedy, it is clear that they would have little incentive to do so if there is no remedy, i.e., if a reasonable mistake may be found.[30] Litigants would surely have no such incentive. A fortiori they would not raise novel claims since new principles would not be applied in their cases. Mertens & Wasserstrom, supra, 70 Geo.L.Rev. at 451.

Thus, the growth which has been is central to the Fourth Amendment, as it

---

[30] The Government maintains that one of the problems with the exclusionary rule is that judges are not willing to condemn questionable practices because of the extreme consequences that attach to such decisions--namely the exclusion of the evidence. By the same token, judges are surely not encouraged to condemn a given practice when there are no consequences in that case. Indeed, Article III may bar the giving of such an advisory opinion. See Mertens & Wasserstrom, supra, 70 Geo.L.J. at 450.

applied to changes in society, would be stymied. If a "reasonable mistake" doctrine had been in place during the past 15 years, many critical Fourth Amendment issues would not have been resolved.[31]

The proposed exception would also eliminate the incentive to train police officers in all aspects of Fourth

---

[31] See, e.g., Payton v. New York, 445 U.S. 573 (1980); Ybarra v. Illinois, 444 U.S. 85 (1980); Delaware v. Prouse, 440 U.S. 648 (1979); Torres v. Puerto Rico, 442 U.S. 465 (1975); Chimel v. California, 395 U.S. 752 (1969); Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967).

The Government appears to welcome such a result, characterizing the "lost decisionmaking opportunities" as inhabiting only "grey, twilight areas of Fourth Amendment law where the constitutional violation, if any, is minimal," or areas of "marginal constitutional significance," involving "nettlesome but relatively inconsequential underlying substantive questions," or "nonrecurring" fact-specific issues. Brief for the United States at 82-83.

Amendment law. If officers are held responsible only for blatant errors and if searches with warrants become virtually unreviewable, police departments will lack the incentive to teach all of the rules.

While the Government recognizes that a purely subjective "good faith" test puts a premium on ignorance, and even dissembling, it claims that the addition of objective standards eliminates the problem. The police would be charged with knowing certain rules, violations of which would not be excused. However, the rules for which they would in fact be held responsible occupy a very narrow part of the spectrum--the so-called clear, settled principles of Fourth Amendment law. In the developing and unsettled areas, good faith ignorance

would be tolerated.[32] Departments as well as individual officers would

---

[32] The "reasonable mistake" approach represents an attempt to engraft a negligence standard onto the exclusionary rule. The reasonably well trained police officer, following the standards of his reasonable training, like the "reasonable man" in tort law, will not be charged with violating the Fourth Amendment. When an officer departs from this mythic reasonable police officer standard his actions will be subject to the exclusionary rule. This model, the Government may argue, is more beneficial and less costly than the "strict liability" exclusionary rule, now in place. However, the standard for the "reasonable police officer" would not be nearly as stringent as the standard for comparable actors in tort law. A doctor, for example, is charged with knowing the subtleties and frontier areas of his practice. The "reasonable police officer" would not be. All that he would have to know are the basic principles: he can muddle through all other situations. In any event, a "strict liability" model is appropriate where the awesome power of the government is concerned. As strict liability forces manufacturers to develop new safety devices, so the absence of a "reasonable mistake" doctrine provides the incentive for police departments to train their officers and to develop procedures for compliance.

thus have an incentive to take chances, with training as well as with on-the-spot decisions.

Thus, despite the Government's objective gloss on the "good faith" exception, the same problem remains: An ignorant officer would be more likely to make good faith mistakes, and a police department which taught the minimum to its officers would thereby expand the scope of "good faith" mistakes. Mertens & Wasserstrom, supra, 70 Geo. L.J. at 448; LaFave, supra, 43 U.Pitt. L. Rev. at 342-343.

C. The Reasonable Mistake Exception Is Unnecessary: There Is No Cost To The Continuation Of The Exclusionary Rule Beyond The Costs Already Imposed by the Fourth Amendment.

The fundamental premise of the Government's "reasonable mistake" doctrine is that somehow the exclusionary rule has become too costly. However, the costs it cites are either greatly exaggerated or merely those already imposed by the Fourth Amendment and not open to this Court to reconsider.

First, the Government paints a picture of Fourth Amendment jurisprudence that is disingenuous, implying that constitutional standards have become technical or subtle, that officers, trying in good faith to follow

them, frequently err. Brief for the United States at 49-52. But over the last several years, this Court has clarified many unsettled areas; it has broadened police power to search,[33] and articulated more flexible rules[34] for arrests and warrants. These cases demonstrate that it is not necessary to gut the exclusionary rule in order to provide police with workable standards; to the contrary, it is the courts, and not the police, that must articulate the standards, and this Court has consistently done so.

---

[33] The Court has broadened the concept of search incident to arrest, United State v. Robinson, 414 U.S. 218 (1973), expanded the contours of "consent" to searches, Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and simplified the rules for auto searches, United States v. Ross, 456 U.S. 798 (1982).

[34] It has held that allegations of negligent falsehood or innocent (cont'd)

Another "cost" cited by the Government is that relevant evidence is suppressed as a result of the rule. The Framers knew that price from the outset. It is the cost of doing without evidence that never should have been obtained in the first place. See, e.g., Brinegar v. United States 338 U.S. 160, 176 (1949).

Another "cost" of the rule, according to the Government, is that it compensates only those accused of crime,

---

(fn. cont'd) mistake of fact are insufficient to set aside a search warrant, Franks v. Delaware, supra, excused a factual error made by a police officer in arresting an individual where there was otherwise ample probable cause to arrest, Hill v. California, 401 U.S. 797 (1971), and held that reliance on a substantive criminal statute, later held to be unconstitutional, or settled Fourth Amendment law, later expressly overruled, does not extinguish a finding of probable cause, Michigan v. DeFillippo, supra, and United States v. Peltier, supra. See also, Illinois v. Gates, supra.

failing to succor the "most deserving"--the innocent victims. Brief for the United States at 23, 74. But the Bill of Rights applies to the guilty and the innocent. Moreover, the extent to which the exclusionary rule fails to compensate innocent victims suggests only that it is an incomplete remedy, not that it is unnecessary. Stewart, supra, 83 Col.L.Rev. at 1396.

The criticism that the exclusionary sanction is disproportionate to the violation is also misplaced. The rule might be disproportionate if its only purpose were to compensate the victim of the search. If the purpose of the rule is broader, establishment of systemic deterrence, the sanction is perfectly appropriate.[35]

---

[35] By the same reasoning, one could, for example, argue that the (cont'd)

Finally, the Government cites the rule's "substantial impact" on the prosecution's ability to obtain convictions and the burden suppression litigation places on the courts. Brief for the United States at 23, 70-75. The empirical data do not support these conclusions. A 1979 study by the General Accounting Office found that of all the cases declined for prosecution by United States attorneys, Fourth Amendment problems were the primary reason in only .4% of the total. Comptroller General, U.S. General Accounting Office, Impact of the Exclusionary Rule on Federal Criminal Prosecutions 14 (1979) (Rep. No. GGD 79-45). The data which the Government cites for the opposite conclusion is

---

(fn. cont'd) cost of the presumption of innocence or the concept of proof beyond a reasonable doubt is too high.

faulty.[36]

---

[36] The Government relies upon a recent National Institute of Justice (NIJ) study of prosecutions in California, Brief for the United States at 70, that states that search and seizure issues led the Government to decline prosecution in "4.8% of the more than 4,000 felony cases," and that in drug cases, 30% were rejected on these grounds. But this study has been shown to be seriously flawed and dramatically overstates the impact of the exclusionary rule on criminal prosecutions. The respondent adopts the arguments on this issue made in the Brief for the Respondent Leon in United States v. Leon, No. 82-1771. See, T. Davies, What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 A.B.F. Res.J. (No. 3, forthcoming); See, also, R. Van Duizend, L. P. Sutton & C. Carter, The Search Warrant Process: Preconceptions, Perceptions, Practices (Draft Only) (National Center for State Courts, Williamsburg, Va. 1983); P. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Research Journal (No. 3) (forthcoming); Davies, Do Criminal Due Process Principles Make a Difference? 1982 Am.B.F.Res.J. 247; Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention, 23 S.Tex.L.Rev. 559, 576 (1982).

III. THE ADOPTION OF A GOOD FAITH OR REASONABLE MISTAKE EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT CHANGE THE OUTCOME IN THIS CASE.

A. The Items Seized At The Defendant's Home Should Be Excluded Because The Error In The Warrant Was "Flagrant" And The Warrant Should Never Have Been Issued by The Magistrate.

Assuming arguendo that a reasonable mistake exception is adopted, this case does not fit within it. The good faith or reasonable mistake of a police officer cannot redeem a clear, indeed, flagrant, judicial error in issuing a warrant and should not provide the basis for admission of evidence obtained with that warrant. Even if the Court were to accept the government arguments that the exclusionary rule is inappropriate in most cases involving a search conducted pursuant to a warrant, in those flagrant cases, in which the warrant is plainly illegal, suppression of the evidence

is required. This is just such a case.

The Solicitor General concurs that there are cases in which the defects of a warrant alone should foreclose further inquiry into the validity of the search, Brief for the United States at 65, and would apply this qualification at least in cases involving patent illegality in which "no officer...could reasonably rely on [the] warrant in light of the unambiguous legal authority," ibid., or alternatively in "those situations in which 'no well-trained officer could reasonably have thought that a warrant should issue.'" Id. at 66 n.28, citing Illinois v. Gates, 103 U.S. at 2346 (White, J., concurring). This, of course, is precisely the situation in Sheppard, as the Solicitor General implicitly acknowledges. Brief for the United States at 67 ("...the search

warrant was technically defective and the defect, had it been noticed, would have been obvious to the issuing judge and to the officers as well").

The Commonwealth of Massachusetts also concedes in its brief that the magistrate committed a "negligent error" in issuing the warrant relied upon by the police in searching the defendant's home. Brief for Petitioner at 25.[37]

---

[37] Justice Liacos points out in his concurring opinion:

> Nowhere in the [trial] judge's written findings is there a finding that the actions of the magistrate were merely negligent. Indeed ... at the hearing on the motion he characterized the actions of the magistrate in these terms: "...so inappropriate [as] to be plainly unconstitutional," ... a "general warrant" akin to the colonial "writs of assistance" ..."flies right in the face of the constitution" ...a "judicial blunder." In describing the warrant, he stated he had "never seen anything so plainly on its face a nullity." A reading of the search warrant in this case reveals (cont'd)

The egregious nature of the magistrate's error forecloses the state's argument that there should be no further inquiry into the legality of the search. That error was a clear, and easily avoidable, violation of the particularity requirement, an essential element of the Fourth Amendment It was a defect in the warrant itself, the one document which is to be executed by a judicial officer. Furthermore, Judge Feeney was fully aware of the defects in the warrant presented to him for his signature.[38] He was

---

(fn. cont'd) that the judge's views were not unduly harsh.

387 Mass. at 511 (J.A. 63a).

[38] It should be assumed that Judge Feeney was fully cognizant of the statutory and constitutional requirements for particularity in a warrant. He was not a lay clerk without training in the law, see Shadwick v. City of Tampa, 407 U.S. 345 (1972), but a judge of the Municipal Court who, at the time he issued the warrant, had been on (cont'd)

informed by the police that they did not have the correct form; they discussed the problem with the warrant; he searched for a more suitable form in his library and, finding none, he examined the warrant and made some unimportant changes. Finally, it is clear that the judge could easily have made the necessary changes in the warrant if he had taken the time to do so.[39]

Like warrants which are "so lacking in indicia of probable cause as to render official belief in its existence entirely

---

(fn. cont'd) the bench for 22 years. Massachusetts Lawyers Weekly Guidebook 79 (1982).

[39] See United States v. LaMonte, 455 F.Supp 952, 964-965 (E.D. Pa. 1978)(handwritten warrant raises no Fourth Amendment problem); see also United States v. Marti, 421 F.2d 1263, 1269 (2d Cir. 1970)("the inconvenience of copying the specific elements from the affidavit into the warrant is small, and the dangers inherent in the failure to do so are great.")

unreasonable," Brown v. Illinois, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring), and like warrants which are totally unsupported by probable cause, see, e.g., Aguilar v. Texas, supra; Nathanson v. United States, supra, or which are issued by a magistrate who is not "neutral and detached," see, e.g., Lo-Ji Sales, Inc. v. New York, supra, a warrant which utterly fails to satisfy the particularity requirement in that it does not describe the items to be seized is one which the magistrate had "no business issuing." Illinois v. Gates, 103 S.Ct at 2345 (White, J., concurring). The stark illegality of such a warrant, measured by the explicit language of the Fourth Amendment's particularity requirement and its consistent interpretation in the decisions of this Court, is such that the

error in issuing it could never be seen as "reasonable."

For example, in Marcus v. Search Warrants, 367 U.S. at 733, the Court found invalid an "obviously defective" warrant authorizing the seizure of "obscene materials," not otherwise described, which allowed the police to seize all materials which, in their judgment, were obscene. Similarly, in Stanford v. Texas, supra, a warrant which was issued for written materials concerning the communist party of Texas and which the Court held gave the officer the "unbridled authority of a general warrant," was disapproved. 379 U.S. at 486.

The warrant in this case was no less "obviously defective" than the warrants in Stanford and Marcus. It was a warrant which should not have been issued, and

for that reason, wholly apart from any asserted good faith on the part of the police officers who executed it, the evidence seized under its authority must be suppressed.

B. The Police Officers Were Not Acting In Good Faith And Did Not Make A Reasonable Mistake In Executing The Warrant.

The essential element of the "good faith" or "reasonable mistake" exception to the exclusionary rule proposed by the Commonwealth of Massachusetts and the Solicitor General is that the conduct of the police officers must be objectively reasonable.[40] Even under the

---

[40] Justice White's formulation of the exception, which has been cited in both government briefs, suggests that it should be invoked only where the police officer was "acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." Stone v. Powell, 428 U.S. 465, 538 (1976)(White, J., dissenting)(emphasis added).

narrowest reading of the proposed exception, it would not apply to searches which were so plainly in violation of the Fourth Amendment as to render official belief in their legality entirely unreasonable. See Brown v. Illinois, 422 U.S. 590, 610-611 (1975)(Powell, J., concurring). There can be no claim that police officers were acting in good faith when they have engaged in "willful, or ... negligent, conduct which has deprived the defendant of some right." Michigan v Tucker, 417 U.S. 433, 447 (1974), and where they had "knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." United States v. Peltier, 422 U.S. 531, 542 (1975).

While the Government suggests that the fact that a warrant has been obtained relieves the police officer of any

responsibility for mistaken judgments about probable cause except for the cases described above, the Government's proposed warrant exception does not address challenges to the execution of the warrant such as one arising from the police officer's failure to read and obey the terms of the warrant.

Measured by a reasonable mistake standard, it is clear that the police conduct executing the warrant in this case was unreasonable and therefore fails to meet even the threshhold requirements of the proposed good faith exception. As Justice Liacos of the Supreme Judicial Court noted, "[t]o take the position that these law enforcement personnel acted in 'good faith' is simply to say that no showing of evil intent has been proved," Commonwealth v. Sheppard, 387 Mass. at 513 (J.A. 65a), but the mere absence of

"evil intent" does not mean that the police were acting in good faith in the sense they could have reasonably believed that their actions were consistent with the requirements of the Fourth Amendment.

The police knew, or unquestionably should have known, the basic requirement of the Fourth Amendment that a warrant must describe with particularity the things to be seized. The detective who was responsible for the preparation of the application for the warrant was an experienced officer who had been on the police force for nineteen years and had been a detective for ten years. He was experienced in the investigation of homicides and was knowledgeable about the procedure for obtaining a search warrant. The other officers who were present at the time were also experienced and, in addition, they were working with

the district attorney and the first assistant district attorney.

The police also knew that the warrant form was not the appropriate one for the search which they intended to conduct and that some modification of the form was required. It was apparent from the face of the warrant that it was intended for use only in narcotics cases, that it was not readily adaptable for use in any other circumstances and that it was particularly unsuited to the search for which the application had been prepared. Detective O'Malley had examined the warrant form and, knowing that it was unsuitable, had made several changes in it, but he did not alter or amend in any way the portion of the warrant form which stated that he had reason to believe that narcotics and related items were being kept at the defendant's home; or the

portion of the form which authorized a search for those items. The police officers' knowledge of the warrant's defects is also clear from the fact that they discussed the deficiency of the warrant with Judge Feeney who confirmed that it was not the proper form.

Finally, the police officers knew or certainly should have known that Judge Feeney had not made any significant changes in the warrant. The police officers and the first assistant district attorney were present when the judge made his perfunctory changes in the warrant. Detective O'Malley, who watched the judge as he changed a few words at the bottom of the warrant, must have seen that the judge had made no substantive changes in the warrant. After the judge had signed the warrant and returned it to them, they had ample opportunity to examine it and

to discover that it was essentially unchanged.

Under these circumstances and with this knowledge or presumed knowledge, the police officers cannot be said to have acted reasonably when they failed even to examine the warrant to insure that the defects had been cured. This is not the conduct that would be expected of a "reasonably well-trained police officer." A reasonably prudent officer would have read the warrant--and read it very carefully--taking special care to see that it was in the proper form.

> ...because everyone knew that they were dealing with an improper "form" warrant that had to be adapted to fit their purposes, extra care should have been taken to ensure that the warrant read properly.

Commonwealth v. Sheppard, 387 Mass. at 512 n.6 (Liacos, J., concurring) (J.A. 64a). And if, under these circumstances, a "reasonably well-trained police

officer" should have known that this warrant was defective, then Detective O'Malley, a highly experienced police officer, and Mr. Buckley, "a trained and experienced prosecutor," id. at 513, certainly should have known it.

If this kind of conduct is excused--particularly in the circumstances of the instant case--police officers would be invited to disregard the terms of a search warrant, and the warrant would be worthless as a limitation on police conduct.

C. The Violation of the Defendant's Fourth Amendment Rights was Neither Harmless Error Nor Insubstantial.

Both government briefs recognize the serious defect in the search warrant and implicitly acknowledge the inapplicability of a good faith or reasonable mistake claim under the circumstances of this case.[41] But their difficulty in forcing this case to fit into one of the proposed categories of excusable violations of the Fourth Amendment leads them to the equally unsupportable argument that the violation can nevertheless be excused as "harmless

---

[41]The Solicitor General admits that the warrant was defective and that "the defect, had it been noticed, would have been obvious to the issuing judge and to the officers as well." Brief for the United States at 67. The state's brief concedes that there was a "technical defect, a negligent error committed by the magistrate in not specifying the items to be seized." Brief for the Petitioner at 25.

error."[42]

The thrust of the government's arguments is not that the error was harmless in the sense that it did not affect the outcome of the defendant's

---

[42] The violation of the Fourth Amendment here was not "harmless error" within the meaning of Chapman v. California, 386 U.S. 18, 22 (1967) and Fahey v. Connecticut, 375 U.S. 85, 86 (1963), where the term is used to describe the impact of illegally obtained evidence on the outcome of the trial, not the effect of police action on the underlying Fourth Amendment right. See also, Brown v. United States, 411 U.S. 223 (1973); Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); United States v. Marti, 421 F.2d 1263, 1268-69 (2d Cir. 1970).

The evidence obtained by the illegal search in this case clearly was not "harmless error" in this sense. After reviewing the entire record in this case, the Massachusetts Supreme Judicial Court concluded that the contested evidence had "probative force tending, independently of other evidence, to prove the defendant's guilt and that its admission cannot be upheld on the ground that such admission was harmless beyond a reasonable doubt." Commonwealth v. Sheppard, 387 Mass. 488, 508 n.21 (1983).

trial but that the Fourth Amendment rights asserted by the defendant are unimportant or "insubstantial."[43] The solicitor general argues that the clear failure of the warrant to describe the objects of the search did not "prejudice" the defendant's right to be free from unreasonable searches and seizures and was, therefore, "harmless"

---

[43]This formulation is analogous, in substance, to the ALI's Model Code of Pre-Arraignment Procedure, §§290.2 (1975), which provides for supression of evidence "only if the court finds that the violation was substantial, or if otherwise required by the constitution of the United States." The approach of the Model Code has been criticized. See, e.g., Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027, 1048 (1974); Note, The Fourth Amendment Exclusionary Rule: Past, Present and No Future, 12 Am.Crim.L.Rev. 507, 536 (1975). See also, Coe, The ALI Substantiality Test: A Flexible Approach to the Exclusionary Sanction, 10 Ga.L.Rev. 1, 34-35 (1975). Because the government arguments are more fundamentally defective, those criticisms need not be repeated here.

because: (1) the police had probable cause to search the defendant's home for evidence of the murder; (2) "the judge thought he was authorizing the police to conduct only the search described in the warrant application"; and (3) the police confined themselves to the search which they believed they had the authority to conduct and did not abuse the authority erroneously given to them by the judge, i.e., they did not search for drugs. Brief for the United States at 67. Accordingly, the Government argues that the absence of a constitutionally valid warrant should simply be ignored. This argument is both factually and legally unsound.

Judge Feeney never found that the police had made a showing that there was probable cause to search the defendant's

home.[44] The trial judge simply concluded that "[t]here was a proper presentment to a magistrate. There was an independent assessment of that disinterested judicial officer that there was probable cause to search." (J.A. 35a). Viewed in the light of the record, which shows that there was no finding of probable cause to conduct the search, this ambiguous statement can only be read

---

[44] While possibly sufficient to establish probable cause under the standards of Brinegar v. United States, supra, and Illinois v. Gates, supra, the affidavit prepared by Detective O'Malley is particularly sparse in view of the fact that it was prepared with the assistance of the district attorney and the first assistant district attorney. As Judge Feeney was limited under Massachusetts law to consideration of the facts set forth in the affidavit, and was not permitted to rely on the oral statements made by O'Malley when the affidavit was presented, see, Commonwealth v. Monosson, 351 Mass. 327 (1966), it is equally possible that Judge Feeney did not find probable cause to authorize a search for some or all of the items listed in the application.

to mean that the judge considered whether probable cause existed for the search, not that he found probable cause. Nor is there anything in the record to support the assertion that the judge thought he was issuing a warrant for the search described in the application. It is simply wrong to assert on this record that the police acted in accordance with a judicial determination of probable cause in conducting their search.

More fundamental, however, is the government's error in suggesting that a violation of the particularity requirement is "harmless" or "insubstantial" and that the defendant was not in any way "prejudiced" by the failure to comply to with that requirement. This analysis ignores both the language and the history of the Fourth Amendment, see pp. 37-38, supra,

and reduces the warrant requirement to a nullity. A violation of the particularity requirement, a requirement expressly referred to in the Constitution, can never be viewed as trivial. The particularity requirement was designed to insure that searches would be conducted only after prior review of their scope and purpose by a magistrate to make certain that they were fully justified and to provide officers with express guidelines for police actions. See Coolidge v. New Hampshire, supra, 403 U.S. at 467. This was a flagrant violation of the requirement. There was no clear determination of probable cause and no specific limits on the scope of the search.

If the government is allowed to rely on an after the fact examination of the totality of the circumstances not

embodied in the warrant or supporting papers to discover whether there were facts that might have justified a finding of probable cause and the issuance of a properly particularized warrant, there would rarely be a need for the police to secure a warrant.

Moreover, there was prejudice to the defendant which can be measured in several ways. First, the search conducted by a team of Boston Police officers was a substantial intrusion into the privacy of the defendant's home. Second, there was prejudice to the defendant in the sense that the unlawful search led directly to the discovery of the evidence which he sought to suppress. Third, there was prejudice in the sense that the introduction of that evidence may have had an impact on the jury which considered his guilt or

innocence.

The recognition by the Court of a category of harmless or insubstantial violations of the particularity requirement would substantially undermine the deterrent function of the exclusionary rule and the basic protection that the Fourth Amendment provides to be free from arbitrary police searches and seizures. In place of the bright line standards for police and judicial conduct that the Court has sought to establish in the past, see, e.g., United States v. Ross, supra; Dunaway v. New York, 442 U.S. 200, 213-214 (1979); the proposed rule would establish a balancing test in which various factors are weighed. Instead of uniformly applying the constitutional rule that warrants must particularly describe the items to be seized, police,

district attorneys, and magistrates would be invited to weigh whether or not an invasion of a citizen's rights will be "substantial" or merely "technical."

In reviewing these claims on a case-by-case basis, courts will be forced to examine the restraint and understanding of the law enforcement officials, the willfulness of the violations, and the effects of the violations on the understanding of the accused. This will result in "unpredictability and a judicial focus on factual precedent" with the development of case law concerning "substantial" violations which would "further disrupt the already murky body of search and seizure law." Note, The Fourth Amendment Exclusionary Rule: Past, Present and No Future, 12 Am.Crim.L.Rev. 507, 536 (1975).

The adoption of the proposed

substantiality test would also convey to law enforcement officials the message that the courts are not concerned with careful observation by the police of Fourth Amendment requirements and that small violations, even if they recur frequently, will be tolerated. This invitation to carelessness should be rejected. The deterrent objective of the exclusionary rule should not be merely to discourage egregious and deliberate violations; it should also deter negligence on the part of officials. The present rule informs police that the successful performance of their job requires a careful attention to the preservation of a suspect's constitutional rights. The adoption of a substantiality test would erode the incentive to diligence and encourage lax attention to formal procedural safeguards.

The Court should therefore reject the government's proposal to muddy the analytical waters of Fourth Amendment analysis by adding another balancing test that will provide little guidance to the police when making their decisions on how to proceed or to courts when reviewing those decisions. Nor should the Court adopt a standard that invites carelessness on the part of individual officers or that discourages rigorous training on the part of their superiors. While we have argued that such a standard should not be established at all, it surely has no applicability where the express requirements of the Fourth Amendment are concerned.

CONCLUSION

For these reasons, the judgment of the Supreme Judicial Court of Massachusetts in Commonwealth v. Sheppard should be affirmed.

Respectfully submitted,

JOHN REINSTEIN
Counsel of Record
Civil Liberties Union
of Massachusetts
47 Winter Street
Boston, Massachusetts 02108
(617) 482-3170

NANCY GERTNER
Silverglate, Gertner, Baker
& Fine
88 Broad Street
Boston, Massachusetts 02110
(617) 542-6663

Counsel for Respondent

NOVEMBER 28, 1983

Supreme Court, U.S.
FILED
JAN 7 1984
ALEXANDER L. STEVAS
CLERK

NO. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT
OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONER

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BARBARA A. H. SMITH
Assistant Attorney General
Chief, Criminal Appellate
Division
One Ashburton Place
Boston, Massachusetts 02109
(617) 727-2240

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. THE LOWER COURT FOUND PROBABLE CAUSE.....2

II. THERE IS NO INCONSISTENCY BETWEEN THE HISTORY OF THE FOURTH AMENDMENT AND A REFUSAL TO EXCLUDE THE EVIDENCE SEIZED IN THE INSTANT CASE.....4

CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

Comm. v. Sheppard,
387 Mass. 488, 502 (App. 54a).....3

Hill v. California,
401 U.S. 797, 805-806 (1971).....4

Illinois v. Gates,
103 S.Ct. 2317 (1983).....4

Miscellaneous

J. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation
30-48 (1966).....5

N. Lasson, The History and Development to the United States Constitution
51-105 (1970).....5

Legal Papers of John Adams,
106-147 (L. Wroth & M. Zobel eds. 1965).....5

Stewart, The Road to Mapp v. Ohio and Beyond: The Origens, Development and Future of the Exclusionary Rule in Search and Seizure Cases,
83 Col. L. Rev 1365, 1381 (1983)....7

NO. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT
OF MASSACHUSETTS

REPLY BRIEF FOR PETITIONER

I. THE LOWER COURT FOUND PROBABLE CAUSE.

For the first time respondent argues in this court that the judge issuing the warrant did not find that probable cause had been established to search for the items listed in the affidavit. See Respondents' Brief, 25-26, 97-98. This suggestion is totally at odds with the defendant's position before the Supreme Judicial Court in which he acknowledged:

> "Judge Feeney reviewed the applications and determined that they set out facts sufficient for probable cause for the search and the arrest." Brief of the Appellant Sheppard, 28.1/

Again, the defendant conceded, "[a]ll of the facts contained in the affidavit and upon which the court relied in its finding of probable

---

1/ A copy of the defendant's brief has been lodged with clerk.

cause..." Brief of the Appellant Sheppard at 33. Defendant quite reasonably did not question whether or not the judge found probable cause, since it is clear that the judge signed the warrant. (J. App. 18a).

The Supreme Judicial Court, as had the Superior Court, clearly concluded that the warrant had issued upon a finding of probable cause (Comm. v. Sheppard, 387 Mass. 488, 502 (App. 54a), and the defendant never attacked this finding below. Indeed, the defendant argued below that the facts supporting the findings of probable cause had been improperly obtained through the interrogation of the defendant and he attacked the facial validity of the warrant. The Supreme Judicial Court formulated the issue to be decided as

"whether the exclusionary rule ... requires the suppression of incriminating evidence obtained in the

course of a police search conducted in good faith, but pursuant to a warrant which, although issued on probable cause, violated the constitutional and statutory requirements that search warrants describe the things to be seized."

Sheppard, 387 Mass. 488-489 (App. 40a-41a). Never having questioned whether such a finding had been made below, respondent should not be permitted to do so at this level. See Illinois v. Gates, 103 S.Ct. 2317 (1983); Hill v. California, 401 U.S. 797, 805-806 (1971).

II. THERE IS NO INCONSISTENCY BETWEEN THE HISTORY OF THE FOURTH AMENDMENT AND A REFUSAL TO EXCLUDE THE EVIDENCE SEIZED IN THE INSTANT CASE.

Respondent argues that the Framers "knew the price" of suppressing relevant evidence "from the outset." and that a finding that violation of the particularity requirement was harmless would ignore the language and history of

the Fourth Amendment (Respondents Brief, 75, 99).

Respondent, it is submitted, fails to fully appreciate the history of the Fourth Amendment. The Amendment grew out of the colonists' negative reaction to the use of the general warrant and writs of assistance.[2/] The basic evils inherent in the existence of the writ of assistance were most notably reflected by James Otis in arguing against the issuance of new writs of assistance to enforce customs laws after the death of George II. As the argument is recounted in 2 Legal Papers of John Adams, 106-147 (L. Wroth & M. Zobel eds.

2/ See gen. N. Lasson, The History and Development to the United States Constitution 51-105 (1970), and J. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional Interpretation 30-48 (1966).

1965), Otis attacked four aspects of the general writ: first, that the writ was Universal in that it was directed to all subjects in the Kings domain; second, that it was Perpetual, in that there was no return and it remained in effect for the life of the sovereign, third, that a person armed with the writ could enter all houses and shops at will and fourth, not only were custom officials empowered with the light of entry, but every person. Petition of Lechmere, Adams, at 142-143. The thrust of the argument was that parliamentary power was not absolute, but bounded by the constitution or fundamental principles Id., at 144. Given the background of the Fourth Amendment - to guarantee against legislative or executive ability to authorize continuous licence to invade ones home or shop to rummage

among ones belongings for any uncustomed goods - the leap made by respondent to an assertion that the framers contemplated exclusion of relevant evidence in criminal cases as a remedy for Fourth Amendment violation is totally without historical support.

Moreover, Justice Stewart specifically refutes respondents' contention in discussing whether either the fourth or fifth amendments directly require exclusion of illegal evidence, stating:

> "Neither provision explicitly creates a right to have unconstitutionally acquired evidence excluded from judicial proceedings. Furthermore, there is nothing in the events giving rise to the adoption of the fourth or fifth amendments that supports the view that the provisions were intended to require exclusion since ... common law courts did not exclude evidence simply because it was obtained by unlawful means." (footnote omitted) Stewart, The Road to Mapp v. Ohio and Beyond: The Origens, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Col. L. Rev 1365, 1381 (1983).

CONCLUSION

For the reasons stated in their brief and in this reply brief, petitioner respectfully requests this Court to reverse the judgement of the court below.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

By: Barbara A.H. Smith

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office-Supreme Court, U.S.
FILED
SEP 10 1983
ALEXANDER L. STEVAS
CLERK

NO. 82-963
NO. 82-1711
NO. 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,
v.
OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,
v.
FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,
v.
ALBERTO ANTONIO LEON, ET AL., *Respondents*.

On Writ of Certiorari to the Supreme Court of Massachusetts, The Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit, Respectively

---

BRIEF OF AMICI CURIAE, SEVEN FORMER MEMBERS OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, THE LEGAL FOUNDATION OF AMERICA, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., ET AL.*, IN SUPPORT OF PETITIONERS

OF COUNSEL:
WAYNE W. SCHMIDT
JAMES P. MANAK
Americans for Effective Law Enforcement, Inc.
FRED E. INBAU
John H. Wigmore Distinguished Prof. of Law, Emeritus Northwestern Univ.
SUSAN WAITE CRUMP
*see cover listed inside cover

DAVID L. CRUMP
The Legal Foundation of America
South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002
(713) 659-8040—Att'y of Rec'd

FRANK G. CARRINGTON
Hon. GRIFFIN B. BELL
Hon. JAMES R. THOMPSON
Hon. DAVID L. ARMSTRONG

OTHER CO-AMICI:

THE STATE OF NORTH CAROLINA,
by Hon. Rufus L. Edmisten, Attorney General, and
David S. Crump, Deputy Attorney General;

INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE;

CALIFORNIA PEACE OFFICERS ASSOCIATION,
COUNTY SHERIFFS OF COLORADO, and
MASSACHUSETTS ASSOCIATION OF CHIEFS OF POLICE,
As police associations from each of the
three States from which these cases arise;

ILLINOIS ASSOCIATION OF CHIEFS OF POLICE;

TEXAS DISTRICT & COUNTY ATTORNEYS ASSOCIATION,
by Tom Krampitz, Executive Director;

SOUTHEASTERN LEGAL FOUNDATION,
by Hon. Ben B. Blackburn, President; and

VICTIM ASSISTANCE LEGAL ORGANIZATION, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF AMICI CURIAE 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE DETERRENCE THEORY DOES NOT JUSTIFY EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH. 5

A. A Person Cannot be Deterred Effectively if he Cannot be Aware, With Reasonable Certainty, What it is That he is to be Deterred From Doing. 6

B. The Original Purpose of the Exclusionary Rule was Addressed to Flagrant Police Misconduct. 8

C. The Recognition of a Good Faith Exception Will Not Impair Either the Deterrence That is Attributed to the Exclusionary Rule or the More Effective Deterrence That Actually Results From Other Remedies. 9

(1) Evidence resulting from bad-faith misconduct will continue to be excluded, and the law of search and seizure will continue to develop. 9

(2) There exist more effective remedies against police misconduct. 11

II. A GOOD FAITH EXCEPTION IS FULLY CONSISTENT WITH THE "JUDICIAL INTEGRITY" RATIONALE. 12

A. The "Judicial Integrity" Rationale is not Served by the Exclusion of Evidence Seized Reasonably and in Good Faith. Rather, the Needless and Counterproductive Exclusion of Such Evidence Itself Impairs Judicial Integrity. 12

(1) Impairment of judicial integrity through the public impression of criminal law as a mass of technicalities. 12

(2) Harm to judicial integrity because the rule is generally disproportionate in its effects to the violation. 13

(3) Impairment of judicial integrity by haphazard results on guilt or innocence. 14

(4) Impairment of judicial integrity owing to a demoralizing effect upon the honest and conscientious police officer. 14

(5) Impairment of judicial integrity because of the difficulty of a court's performing a task given to the executive, that of maintaining detailed policies for police performance. 16

(6) Impairment of judicial integrity by the appearance of shifting and inconsistent appellate decision-making. 16

(7) Impairment of judicial integrity by the effect on the accused: The perceived irrelevance of guilt or innocence. 17

(8) Untruthful fact presentation to jurors by

officers of the court. 18

B. The "Judicial Integrity" Rationale is Circular When it is Used to Exclude Evidence Seized Reasonably and in Good Faith. 18

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Alderman v. United States, 394 U. S. 164 (1969) 9
Arkansas v. Sanders, 442 U. S. 753 (1979) 17
Beck v. Ohio, 397 U. S. 89 (1964) 9
Bivens v. Six Unknown Agents, 403 U. S. 388 (1971) 13
Carrol v. U. S., 267 U. S. 132 (1925) 17
Chambers v. Maroney, 399 U. S. 42 (1970) 17
Chimel v. California, 395 U. S. 752 (1969) 17
Commonwealth v. Sheppard, 441 N. E. 2d 725 (Mass. 1982) 13
Coolidge v. New Hampshire, 403 U. S. 443 (1971) 6, 7, 17
Davis v. Mississippi, 394 U. S. 721 (1969) 9
Ehrlichman v. U. S., 546 F. 2d 910 (D. C. Cir. 1976) 9
Elkins v. U. S., 364 U. S. 206 (1960) 8
Harris v. New York, 401 U. S. 222 (1971) 17
Husty v. United States, 282 U. S. 694 (1931) 17
Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983) 1, 8
Irvine v. California, 347 U. S. 128 (1954) 12
Mapp v. Ohio, 367 U. S. 643 (1961) 7, 8, 12
Michigan v. Tucker, 417 U. S. 433 (1974) 16, 17
Monnell v. Dep't of Social Serv., 436 U. S. 658 (1978) 11
Olmstead v. U. S., 277 U. S. 438 (1928) 8
Owen v. City of Independence, 445 U. S. 622 (1980) 11
Owens v. Haas, 601 F. 2d 1242 (2nd Cir. 1979), cert. denied sub nom. County of Nassau v. Owens, 444 U. S. 980, 100 S. Ct. 483, 62 L. Ed. 2d 407 (1979) 11
Preston v. United States, 376 U. S. 364 (1964) 17
Rose v. Lundy, 102 S. Ct. 1198 (1982) 6
Snyder v. Massachusetts, 291 U. S. 122 (1934) 13
Stone v. Powell, 428 U. S. 465 (1976) 16
Turpin v. Mailet, 619 F. 2d 196 (2nd Cir.); cert. denied sub nom. Turpin v. West Haven, 449 U. S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980) 11
Texas v. White, 423 U. S. 67 (1975) 17

United States v. Calandra, 414 U. S. 338 (1974) 17
U. S. v. Ceccolini, 435 U. S. 368 (1978) 16
U. S. v. Mendenhall, 446 U. S. 554 (1980) 6
U. S. v. Peltier, 422 U. S. 531 (1975) 16
U. S. v. Rabinowitz, 339 U. S. 56 (1960) 17
U. S. v. Ross, 102 S. Ct. 2157 (1982) 17
U. S. v. Tucker, 404 U. S. 433 (1972) 17
U. S. v. Williams, 622 F. 2d 830 (5th Cir. 1980) (en banc) 5
Webster v. City of Houston, 689 F. 2d 1220 (5th Cir. 1982) 11

STATUTES

42 U. S. C. Sec. 1983 (1964) passim

PERIODICALS, TREATISES AND OTHER AUTHORITIES

F. L. BAILEY, THE DEFENSE NEVER RESTS (1968) 17
Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment? 30 De Paul L. Rev. 51 (1980) 10
Brief for American Bar Association as Amicus Curiae at 17 in Gates v. Illinois, 51 U. S. L. W. 4709 (U. S. S. Ct. June 3, 1983) 10
COMPTROLLER GENERAL OF THE UNITED STATES, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS, Rep. No. CGD-79-45 (19 April 1979) 5
COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING (1976) 18
W. O. DOUGLAS, THE COURT YEARS 387 (1980) 9
Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980 14
N. JOHNSON, L. SAVITZ & M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION (1962) 15
S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES (3rd ed. 1975) 13

National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982) 6
Oaks, Studying the Exclusionary Rule in Search & Seizure, 37 U. CHI. L. REV. 665, 672, 678 (1970) 5
Rawitscher & Carnahan, Search and Seizure and Suppression Proceedings, in STATE BAR OF TEXAS ADVANCED CRIMINAL LAW COURSE (D. Crump ed. 1979) 15
S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-57 (1977) 5
Shepard's United States Citations, 1976 Supp., Vol. 4 7
Support for Exclusionary Rule Modification to Provide for Admissibility of Evidence Obtained by a Law Enforcement Officer Acting in Good Faith, 1982: Hearings on S. 101, S. 751 and relevant portions of S. 1995, Before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess. 226-27 (1982) 10

NO. 82-963
NO. 82-1711
NO. 82-1771

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,
v.
OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,
v.
FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,
v.
ALBERTO ANTONIO LEON, ET AL., *Respondents*.

BRIEF OF AMICI CURIAE, SEVEN FORMER MEMBERS OF THE ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, THE LEGAL FOUNDATION OF AMERICA, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., ET AL.*, IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Because of their number,* amici will be described in groups.

---

* A similar group of amici appeared last term in Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983). At that time, the Clerk's office advised that as many amici as possible be consolidated in a single brief to minimize imposition upon the Court. Amici herein have attempted to comply with that advice, and hence this brief reflects the joinder of several different categories of amici.

I. *Seven Former Members of the Task Force on Violent Crime of the Attorney General of the United States.* On April 10, 1981, the Attorney General of the United States convened a Task Force on Violent Crime. The objective of the Task Force was to make specific recommendations to the Attorney General concerning ways in which the federal government could combat violent crime.

Members of the Task Force were:

Honorable Griffin B. Bell, Esq., Former Attorney General of the United States; Former Judge, U. S. Court of Appeals for the Fifth Circuit, Co-Chairman.

Honorable James R. Thompson, Esq., Governor of Illinois, Co-Chairman.

Honorable David L. Armstrong, Esq., District Attorney, Jefferson County (Louisville), Kentucky.

Frank G. Carrington, Esq., Executive Director, Crime Victims Legal Organization.

Robert L. Edwards, Director, Local Law Enforcement Assistance, Florida Department of Law Enforcement.

William L. Hart, Chief of Police, Detroit, Michigan.

Honorable Wilbur F. Littlefield, Public Defender, Los Angeles County.

Professor James Q. Wilson, School of Government, Harvard University.

One of the recommendations (No. 40) made to the Attorney General by the Task Force read, in pertinent part:

> **In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution . . . We recommend that the Attorney General instruct United States Attorneys and the**

Solicitor General urge this rule in appropriate court proceedings, or support federal legislation establishing this rule, or both.*

The Task Force dissolved on August 17, 1981, when it delivered its Final Report to the Attorney General. Thus, these amici are not an official government body but a group of *former* members. Amici hope, however, that, having taken lengthy testimony about the Rule during hearings, they might be able to assist this Court in reaching its conclusion.

II. *Peace Officers' Associations and Related Groups.* These organizations are designed to promote and foster police and prosecutor professionalism on the national and state levels. These amici include organizations from each of the States from which the present cases arise: The California Peace Officers' Association, County Sheriffs of Colorado, and Massachusetts Association of Chiefs of Police. In addition, these amici include the International Association of Chiefs of Police, Inc., the Illinois Association of Chiefs of Police, Inc., and the Texas District and County Attorneys Association, which is an association of elected district and county attorneys and their assistants in Texas.

III. *Public Interest Law Centers.* A number of centers, foundations, and other organizations that engage in research, litigation, education and public information on criminal justice matters are co-amici on this brief. They include Americans for Effective Law Enforcement, Inc.; The Legal Foundation of America; Southeastern Legal Foundation, Inc.; and Victims' Assistance Legal Organization, Inc.

---

* Mr. Littlefield dissented from this recommendation; hence, his name is not associated with this brief. The Seven Members in the majority were Messrs. Bell, Thompson, Armstrong, Carrington, Edwards, Hart and Wilson, all of whom have requested that their names be associated with this brief.

IV. *Other Co-Amici: State of North Carolina, et. al.* Amici are also joined by the State of North Carolina, by and through the Hon. Rufus L. Edmisten, Esq., Attorney General, State of North Carolina, and David S. Crump, Esq., Deputy Attorney General.*

SUMMARY OF ARGUMENT

The "Deterrence" Rationale. The deterrence theory does not justify exclusion of evidence seized in good faith. The good faith standard that is sought is one based upon objective reasonableness. Given the complexity of search and seizure law, it is unlikely that greater deterrence can possibly result from the current rule of universal exclusion. The rule was originally addressed to flagrant misconduct, and a good faith standard would bring the law closer to its purposes. Such a standard would still require exclusion of bad faith searches, the courts would continue to consider such cases, and such remedies as section 1983 actually provide a more effective deterrent in any event.

The "Judicial Integrity" Rationale. Judicial integrity is not served by indiscriminate, universal exclusion. Without a good faith exception, the exclusionary rule actually decreases public respect for the courts. It (1) reinforces the public impression that criminal law is composed of dysfunctional technicalities; (2) is palpably disproportionate to the violation in many cases; (3) creates haphazard results upon guilt or innocence; (4) demoralizes the conscientious officer; (5) makes executive branch responsibility for police conduct more difficult to discharge; (6) places appellate courts in ostensibly shifting and inconsistent doctrinal positions; (7) encourages the accused to conclude that guilt or innocence is irrelevant; and (8) forces officers of the court to present facts untruthfully.

---

* Amici wish to acknowledge the assistance of law student Chris Di Ferrante in the preparation of this brief.

ARGUMENT

I. THE DETERRENCE THEORY DOES NOT JUSTIFY EXCLUSION OF EVIDENCE SEIZED REASONABLY AND IN GOOD FAITH.

It is to be emphasized that the good faith standard Petitioners are seeking is an objective standard. As one court said, in adopting a similar objective standard,

> [T]he [search] . . . must be grounded in objective reasonableness. It must therefore be based upon articulable premises sufficient to cause . . . a reasonably trained officer to believe that he was acting lawfully. Thus a series of broadcast breakins and searches carried out by a constable—no matter how pure in heart—who had never heard of the fourth amendment, could never qualify.[1]

There is no evidence that the present universal rule of exclusion accomplishes its purpose better than one based on objective good faith, and in fact there is evidence to the contrary.[2]

---

1 Williams v. United States, 622 F. 2d 830 (5th Cir. 1980) (en banc). See also AELE Model Statute, cited in Hearings, note 9 infra, at 227. Although Williams refers to a test that is both objective and subjective, amici here would urge the Court to adopt an objective test.

2 The seminal work is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665, 672, 678 (1970) (empirical study showing absence of deterrent effect and describing rationale as "fig leaf phrases used to cover naked ignorance"). Later, Professor Steven Schlesinger summarized several empirical studies, all of which concluded that deterrence could not be demonstrated, except one, which was inconclusive. S. SCHLESINGER, EXCLUSIONARY INJUSTICE 50-57 (1977). Cf. Comptroller Gen. of the United States,

A. *A person cannot be deterred effectively if he cannot be aware, with reasonable certainty, what it is that he is to be deterred from doing.*

As a matter of logic, it is unrealistic to expect more effective deterrence of disfavored conduct from a universal rule of exclusion than from one incorporating an objective good faith standard. The complexity of search and seizure law makes it unlikely that greater deterrence can possibly result.

The fragmentation of search and seizure opinions is illustrated by the syllabus to *United States v. Mendenhall*, 446 U. S. 554 (1980):

> Stewart, J., announced the court's judgment and delivered an opinion . . . . with respect to Parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ., joined. Powell, J., filed an opinion concurring in part and concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. White, J., filed a dissenting opinion in which Brennan, Marshall, and Stevens, JJ., joined.

Amici submit that when Justices of the Court disagree over parts and sub-parts of a ruling, it is unrealistic to expect that a police officer, acting under the exigencies that are inherent in police work, should have a superior knowledge of the legal concepts that have split the Court. Such divisions are not unusual in search and seizure law. See also, e.g., *Rose v. Lundy*, 102 S. Ct. 1198 (1982); *Coolidge v. New Hampshire*, 403 U. S. 443 (1971).[3]

Impact of the Exclusionary Rule on Federal Criminal Prosecutions, Rep. No. CGD-79-45 (19 April 1979) (GAO Study); National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California (1982).

3 The Syllabus in Rose v. Lundy is as follows: J. O'Connor delivered the opinion of the court except as to Part III-C, J. Blackmun filed an opinion concurring in the judgment, J.

These difficulties are aggravated by what might be called the "pyramid effect." Each opinion of this Court is at the apex of our jurisprudence, and it is subsequently interpreted by federal courts of appeal, federal district courts, state supreme courts, state appellate courts and state trial courts. For example, Shepard's United States Citations, 1976 supplement, volume 4, lists 42 entries from United States Reports and approximately 1200 lower court entries citing *Mapp v. Ohio*, alone. Each reinterpretation shifts meanings, sometimes slightly, sometimes significantly. A good faith exception would not avoid these complexities, but it would recognize that all that can be expected of a police officer is that he act reasonably and in good faith.

In fact, the universal exclusionary rule is likely to frustrate the policy of deterrence in some instances. For example, it contravenes the fourth amendment preference for warrants, because it makes the showing of a valid search more difficult in the case of a warrant.[4] But more fundamentally, if the exclusionary rule is applied indiscriminately to bad faith misconduct

---

Brennan filed an opinion concurring in part and dissenting in part, in which J. Marshall joined, J. White filed an opinion concurring in part and dissenting in part. J. Stevens filed a dissenting opinion.

The syllabus in Coolidge v. New Hampshire is as follows: Stewart, J., delivered the opinion of the court, in which Burger, C. J., (as to Part III) and Harlan (as to Parts I, II-D, and III), Douglas, Brennan, and Marshall, JJ., joined. Harlan, J., filed a concurring opinion, post, p. 490. Burger, C. J., filed a concurring and dissenting opinion, post, p. 492. Black, J., filed a concurring and dissenting opinion, in a portion of Part I and in Parts II and III of which Burger, C. J., and Blackmun, J., joined, post, p. 493. White, J., filed a concurring and dissenting opinion, in which Burger, C. J., joined, post, p. 510.

4 It is sometimes said that exclusion "deters" inadvertent errors by judges issuing warrants. Again, however, the remedy lacks proportionality; exclusion as a deterrent to reasonable conduct is unlikely to increase compliance. Furthermore, such a drastic remedy has never been invoked as to judges' conduct; indeed, judges are absolutely immune to 1983 actions for civil rights violations (even intentional ones), on the theory that they need

and to reasonable, good-faith searches, it cannot have the educational function that its proponents attribute to it. It is more likely to frustrate those who try to comply with it, and frustration is not an effective tool of either education or motivation.

B. The original purpose of the exclusionary rule was addressed to flagrant police misconduct.

Originally, the exclusionary rule was intended to deter "official lawlessness in *flagrant* abuse" of the Constitution.[5] *Mapp v. Ohio*, 367 U. S. 643, 655 (1961) (emphasis added). That the criminal should go free was unfortunate, but it would be far worse for courts "to declare that the Government may *commit crimes* in order to secure the conviction of a private criminal . . . . " *Elkins v. United States*, 364 U. S. 206, 223 (1960) (emphasis added), quoting from *Olmstead v. United States*, 277 U. S. 438, 485 (1928) (Brandeis, J. dissenting).[6]

This was the original theory of the exclusionary rule. But in recent years the rule has been applied in cases in which there has been no police misconduct and in which the police have behaved reasonably in all respects, such as the cases at bar. Evidence has been suppressed simply because the police, or the magistrate upon whom they relied, made a reasonable judgment as to some factual, practical matter, such as the existence of probable cause, with which the court subsequently reviewing their conduct disagreed. Recognition of a good faith exception would go far toward bringing the rule back to its original purpose.

---

to be free to decide fearlessly; to use a suppression remedy as a "deterrent" to judges would be anomalous.

5 Much of this discussion originated with the Brief of Petitioner State of Illinois, Illinois v. Gates, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983) (on rehearing).

6 The "judicial integrity" rationale supports the same view of the exclusionary rule. See Part II of this Brief, infra.

C. *The recognition of a good faith exception will not impair either the deterrence that is attributed to the exclusionary rule or the more effective deterrence that actually results from other remedies.*

The recognition of a constitutional right does not imply that any particular remedy is exclusive. This Court has always recognized the difference between rights and remedies. It has consistently attempted to choose remedies by pragmatic considerations, rather than by doctrines bound to the right that is to be enforced. The choice of one remedy rather than another by a practical calculus of advantages and disadvantages has never been thought to imply any devaluation of the right at issue, nor should it here. [7]

(1) Evidence resulting from bad-faith misconduct will continue to be excluded, and the law of search and seizure will continue to develop.

The law of search and seizure is sufficiently clear in many instances that its violation cannot be characterized as reasonable or in good faith. Extreme examples would include arrests at will of anyone who has previously been convicted of crime, cf. *Beck v. Ohio*, 397 U. S. 89 (1964); dragnet arrests of anyone who might be remotely suspected of crime, cf. *Davis v. Mississippi*, 394 U. S. 721 (1969); surreptitious violations of wiretap statutes, cf. *Alderman v. United States*, 394 U. S. 165 (1969); or unwarranted and unauthorized entry into private premises or residences in the absence of any claim of exigent circumstances, cf. *Ehrlichman v. United States*, 546 F. 2d 910 (D. C. Cir. 1976) (denying good faith defense in criminal prosecution for government official's break-in of office). Amici applaud the basic principles underlying such decisions, and we would point out that

---

7 The Memoirs of Mr. Justice Douglas indicate that the Court actually focussed its consideration upon three alternative remedial devices before choosing the exclusionary rule. W. DOUGLAS, THE COURT YEARS 387 (1980).

there are many other situations in which the law is sufficiently clear, or the violation sufficiently serious, that no one could contend that a search or seizure was in good faith. In such clear situations, exclusion of the evidence would follow because the good faith exception advocated here simply would not apply.

For these reasons, the law of search and seizure will continue to develop after a good faith exception is adopted. Good faith and reasonableness do not become relevant issues in the case until there has been a determination in the first instance that the law of search and seizure would otherwise require exclusion. Furthermore, good faith and reasonableness are inseparable from the development of the law, because the *objective* reasonableness of the officer's conduct must always be tested against the law. As one commentator has written, "A reasonable, good faith standard, by retaining an objective element, permits, even necessitates, judicial review." [8] Opponents' objections to the effect that a good faith exception might make rulings on fourth amendment issues "impossible," cf. Brief for American Bar Association as Amicus Curiae at 17 in *Illinois v. Gates*, 51 U. S. L. W. 4709 (U. S. S. Ct. June 8, 1983), are not well taken.

But perhaps the most convincing evidence that the good faith exception would not lead to an atrophy of fourth amendment values comes from the Fifth and Eleventh Circuits. Testimony before the Congress, in its consideration of a statutory alternative to the universal exclusionary rule, indicates no abuse of the good faith exception adopted by both Circuits,[9] and both

---

8 Bernardi, The Exclusionary Rule: Is a Good Faith Standard Needed to Preserve a Liberal Interpretation of the Fourth Amendment? 30 De Paul L. Rev. 51, 101 (1980).

9 Support for Exclusionary Rule Modification to Provide for Admissibility of Evidence Obtained by a Law Enforcement Officer Acting in Good Faith, 1982: Hearings on S. 101, S. 751 and relevant portions of S. 1995, before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess. 226-27 (1982).

have continued to decide search and seizure issues in a manner that has continued the development of the law.

(2) There exist more effective remedies against police misconduct.

In contrast to the inefficiency of a universal exclusionary rule, 42 U. S. C. sec. 1983 (1964) (the civil rights damage statute) provides a highly effective deterrent. In situations involving bad faith searches, the damage remedy provides a powerful punitive measure against individual officers. Furthermore, municipalities or other government entities do not have any defense of good faith in 1983 actions. *Owen v. City of Independence*, 445 U. S. 622 (1980). They can thus be held liable for damages caused by a search that is ultimately determined to be unlawful, even if they act in good faith. Claims against municipalities are recognized if the damage is caused by an "official policy" of the municipality,[10] but an official policy need not be formal, and it can be evidenced by such inactions as failure to train officers properly, inadequate supervision, or toleration.[11] It should be reiterated that a bad faith seizure would continue to require suppression under the proposed approach, and thus whatever deterrence can result from suppression would be preserved; but what is more significant is that the "pure hearted" constable referred to above, who committed breakins because he had "never heard of the fourth amendment," would not only see the resulting evidence suppressed, but would himself likely be liable in damages *and* would make his municipality liable because he had been inadequately trained.

---

10 Monell v. Dep't of Social Serv., 436 U. S. 658 (1978).

11 Owens v. Haas, 601 F. 2d 1242 (2nd Cir. 1979), cert. denied sub nom. County of Nassau v. Owens, 444 U. S. 980, 100 S. Ct. 483, 62 L. Ed. 2d 407 (1979); Turpin v. Mailet, 619 F. 2d 196 (2nd Cir.), cert. denied sub nom. Turpin v. West Haven, 449 U. S. 1016, 101 S. Ct. 577, 66 L. Ed. 2d 475 (1980). See also Webster v. City of Houston, 689 F. 2d 1220 (5th Cir. 1982).

As this Court has said, "The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." *Irvine v. California*, 347 U. S. 128, 136-37 (1954) (plurality opinion). While few remedies are perfect, the 1983 remedy is far superior. It provides a direct protection to innocent victims of unlawful police conduct, and in the case of municipal liability it does so even if the unlawful acts are committed in good faith. Furthermore, it places the onus on the person or entity whose action caused the violation. The direct benefits of the exclusionary rule are available only to guilty criminals, and perhaps more importantly, the object of its punishment is the society at large.

II. A GOOD FAITH EXCEPTION IS FULLY CONSISTENT WITH THE "JUDICIAL INTEGRITY" RATIONALE.

A. The "judicial integrity" rationale is not served by the exclusion of evidence seized reasonably and in good faith. Rather, the needless and counterproductive exclusion of such evidence itself impairs judicial integrity.

A second principle that is sometimes said to underlie the exclusionary rule is that courts should avoid the taint of illegally seized evidence. E.g., *Mapp v. Ohio*, 367 U. S. 643 (1961). Courts are nondemocratic institutions without independent enforcement mechanisms. If their orders are to prevail in unpopular as well as popular causes, they must have public respect.

To the extent that there is validity to this rationale, it is the exclusion of evidence honestly and reasonably seized, not its reception, that actually impairs judicial integrity.

(1) Impairment of judicial integrity through the public impression of criminal law as a mass of technicalities.

The first way in which the exclusion of honestly and reasonably seized evidence taints a court is by creating a public impression that the criminal law is a mass of dysfunctional technical-

ities. This danger was articulated by Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. 97, 122 (1934), as follows:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

Although the error in *Snyder* was exclusion of the defendant from the proceedings and an improper remark by the trial judge, rather than an illegal seizure, the reasoning applies equally to the cases at bar.

(2) Harm to judicial integrity because the rule is generally disproportionate in its effects to the violation.

Secondly, proportionality is such an important value in the criminal law that it is typically examined by every first-year law student. But the current enforcement of the exclusionary rule is seriously inconsistent with this fundamental principle. Cf. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 155-67 (3rd ed. 1975). Such philosophers as Bentham, Hart, Stephen, and Feinberg have emphasized the disrespect that the law engenders when its response is disproportionate to the severity of an alleged violation. Id. As Mr. Chief Justice Burger said in dissent in *Bivens v. Six Unknown Agents*, 403 U. S. 388, 419 (1971), "Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way."

In one of the decisions below, a relatively slight and honest oversight in conditions of great time pressure caused the exclusion of crucial evidence gained by excellent police work, against a murderer who burned the unconscious but living body of his victim with gasoline. *Commonwealth v. Sheppard*, 441 N. E. 2d

725 (Mass. 1982). All who are affected by the case must feel that this all-or-nothing approach is disproportionate.

(3) Impairment of judicial integrity by haphazard results on guilt or innocence.

Third, exclusion of reasonably and honestly seized evidence taints the criminal justice system by causing haphazard adjudication of guilt or innocence. Inconsistent results are sometimes unavoidable under the Constitution, but they should not be encouraged when unnecessary.

An incident that occurred several years ago in Harris County (Houston), Texas illustrates the point. The District Attorney presented seventy-three drug possession cases, some of which were appropriate for no-bills because of searches that would require suppression, and some of which were appropriate for true bills because of searches deemed valid. The grand jury, however, no-billed all cases in both groups, in part because it was unable to rationalize differential treatment of the persons involved on the basis of what the grand jurors apparently regarded as irrational distinctions. Interview with James Larkin, Assistant District Attorney of Harris County, Texas, in Houston, Nov. 24, 1980. The haphazard adjudication that this grand jury impliedly condemned would not be removed by a good faith exception, but it would be lessened.

(4) Impairment of judicial integrity owing to a demoralizing effect upon the honest and conscientious police officer.

Fourth, exclusion of reasonably and honestly seized evidence taints the courts by demoralizing the conscientious police officer, making him less likely, not more likely, to understand and follow fourth amendment decisions. Fourth amendment law immediately dissolves into ambiguity in a concrete factual situation. The variety of probable cause judgments is infinite. It is overlaid by a bewildering array of doctrines such as plain view, stop and frisk, inventory, exigent circumstances, and consent. Procedural considerations such as standing and burden of proof

influence a variety of cases. The officer will see a seemingly reasonable seizure struck down in one case and a borderline one upheld in the next.

Even experts complain that they cannot understand search and seizure law. As two prominent criminal defense lawyers have written,

> In determining the balance, guidelines have been spelled out by the Supreme Court. A great deal of difficulty arises in applying the many guidelines to a particular set of facts .... [T]he decisions dealing with search and seizure appear to be in a constant state of change.

Rawitscher & Carnahan, *Search and Seizure and Suppression Proceedings*, in STATE BAR OF TEXAS, ADVANCED CRIMINAL LAW COURSE (D. Crump ed. 1979). If the decisions induce this reaction in a criminal law scholar, they must resemble a roulette wheel to the officer who risks his life in good faith, only to be told that his conduct was "illegal" and must be "deterred" by suppression. Research confirms what common sense suggests: aberrational acts of misconduct are most common in situations in which individuals, including police officers, perceive that they are unlikely to obtain justice in the court system. Cf. N. JOHNSON, L. SAVITZ & M. WOLFGANG, THE SOCIOLOGY OF PUNISHMENT AND CORRECTION 11 (1962).

The three cases at bar are an example. In *Colorado v. Quintero*, it can only engender disrespect for courts if the officers are told they acted illegally, when they honestly and quite reasonably made the judgment, in the field, that probable cause existed, and their only other choice was to let the suspect leave with property of victims that any ordinary person would conclude was stolen. In *Leon* and *Sheppard*, the officers acted on the authority of warrants issued, from all that appears, by courts acting as they sincerely deemed the law required; and for the officers to fail to execute such a warrant would have been, itself, an act of disobedience of a court order. Yet in response to their obedience, the officers are told by the suppression order that

their conduct was "willfully" unlawful, to use the words of *Michigan v. Tucker*, 417 U. S. 433, 477 (1974).

(5) Impairment of judicial integrity because of the difficulty of a court's performing a task given to the executive, that of maintaining detailed policies for police performance.

The executive is the branch charged with supervision of the details of law enforcement. Efforts by courts to maintain detailed supervision of police performance are an erosion of the separation of powers and are likely to impair the ability or motivation of the executive to undertake the task. The essence of professionalism is repeatable procedures, and the confusing overlay of doctrines in search and seizure frustrates the ability of the executive to prescribe uniform conduct. It also dilutes the public perception of the locus of responsibility. Furthermore, the "secondhand" control of the exclusionary rule is simply ineffective to supervise with the kind of detail the courts have attempted, making the courts themselves appear ineffectual. If the conduct is seriously inconsistent with law, suppression may be more clearly justified, but this result would follow from the recognition of a good faith exception.

(6) Impairment of judicial integrity by the appearance of shifting and inconsistent appellate decision-making.

Sixth, the present administration of the exclusionary rule places appellate courts in ostensibly shifting and inconsistent doctrinal positions. This Court has withheld suppression when the illegality has been attenuated by intervening events, the defendant has lacked standing, the challenge has arisen in a habeas corpus action, use of the evidence was before the grand jury, use was for impeachment, or the resulting arrest was used to increase sentence in another case.[12] On occasion, doctrinal

---

12 United States v. Ceccolini, 435 U. S. 368 (1978); Stone v. Powell, 428 U. S. 465 (1976); United States v. Peltier, 422 U. S.

justification fails to prevent the appearance of a zig-zag course; this is especially so in cases involving vehicles taken to another location, containers, and searches incident to arrest.[13] These difficulties are the natural result of practical efforts with conflicting policy, but they create a nagging suspicion that interpretive principles cannot be reconciled with a reasonable view of the fourth amendment. Often, the true reason for admitting evidence is that the officer has acted honestly and reasonably, and explicit recognition of this reason would bring the law into line with its purposes.

(7) Impairment of judicial integrity by the effect on the accused: The perceived irrelevance of guilt or innocence.

Seventh, the exclusionary rule taints the criminal justice system by inducing the accused to believe that his guilt or innocence is not important. One popular author has written that "innocence becomes less relevant" as the criminal justice system progresses. F. L. BAILEY, THE DEFENSE NEVER RESTS 1 (1968). Disparate treatment creates cynicism in the accused. It has been identified by wardens in some states as a greater cause of prison unrest than food, overcrowding, or conditions of incar-

---

531 (1975); Michigan v. Tucker, 417 U. S. 433 (1974); United States v. Calandra, 414 U. S. 338 (1974); United States v. Tucker, 404 U. S. 433 (1972); Harris v. New York, 401 U. S. 222 (1971).

13 With respect to automobile searches, compare Chambers v. Maroney, 399 U. S. 42 (1970); Preston v. United States, 376 U. S. 364 (1964); Husty v. United States, 282 U. S. 694 (1931); and Carroll v. United States, 267 U. S. 132 (1925) with Arkansas v. Sanders, 442 U. S. 753 (1979); Texas v. White, 423 U. S. 67 (1975); Coolidge v. New Hampshire, 403 U. S. 42 (1971). With respect to containers, compare United States v. Ross, 102 S. Ct. 2157 (1982) with Arkansas v. Saunders, 442 U. S. 753 (1979). As to searches incident to arrest, compare United States v. Rabinowitz, 339 U. S. 56 (1960) (overruling prior authority) with Chimel v. California, 395 U. S. 752 (1969) (overruling Rabinowitz).

ceration. COUNCIL ON STATE GOVERNMENTS, DEFINITE SENTENCING 10 (1976). Although this finding was stated in the context of sentencing disparity, the same kind of prisoner cynicism is likely to be generated when disparity is caused by the exclusionary rule.

(8) Untruthful fact presentation to jurors by officers of the court.

Finally, the exclusion of reasonably and honestly seized evidence taints the criminal justice system by presenting an untruthful impression to the trier of fact. A conscientious defense lawyer is likely to argue to the jury that the government has not presented sufficient evidence in a trial from which evidence has been suppressed. He is likely to follow with criticism of the government for prosecution of the case without the type of evidence that is missing.[14]

If the seizure is flagrantly improper, suppression may be justifiable; however, a juror is likely to feel that he has been unfairly tricked if he learns that the truth has been hidden from him by officers of the court notwithstanding a reasonable, good-faith search. Perhaps the saddest effect of this misrepresentation is its effect upon defense counsel. It is understandable that many attorneys avoid the criminal defense practice because they do not wish to be the tools of such deception.

B. The "judicial integrity" rationale is circular when it is used to exclude evidence seized reasonably and in good faith.

The label of "illegality" in search and seizure law does not, by itself, adjudge the integrity of the officer's conduct. Often,

---

14 The "open door" or reply doctrine would allow prosecution response if defense counsel referred by name to the specific item suppressed, but through the exercise of minimal skill, defense counsel can make a general enough reference to prevent response and still get the point across.

the label is affixed in spite of recognition that an officer has acted reasonably and sincerely (as in the present cases), and it represents only a conclusion that the policies of the fourth amendment would be best served in a pragmatic way by exclusion or that case authority so interprets those policies. But when a court has thus determined illegality without regard to the *actual* propriety of the acts leading to the seizure, there is an absence of logic in the assertion that the label of "illegality" the court has itself thus affixed to the evidence would undermine its integrity. In these circumstances, in other words, it is circular to say that judicial integrity demands exclusion.

CONCLUSION

The recognition of an objective good-faith standard is not made inappropriate by the deterrence theory. The complexity of search and seizure makes it unlikely that greater deterrence can possibly result from universal exclusion. Bad faith searches would still require exclusion, the courts would continue to consider such cases, and such remedies as section 1983 actually provide more effective deterrence than exclusion in any event.

Furthermore, the recognition of a good-faith exception to the judicially created rule of exclusion would not impair judicial integrity. Instead, it is the unnecessary and counterproductive exclusion of evidence seized reasonably and in good faith that actually threatens to impair public respect for courts. The decisions below should be reversed.

Respectfully submitted,

David Crump
The Legal Foundation of America
Professor of Law,
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040

Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-963

In the Supreme Court of the United States

October Term, 1983

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF AMICI CURIAE, THE STATE OF ARKANSAS AND GULF & GREAT PLAINS LEGAL FOUNDATION, IN SUPPORT OF PETITIONER

WILKES C. ROBINSON*
DAN M. PETERSON
GULF & GREAT PLAINS LEGAL FOUNDATION
1000 Brookfield Building
101 West 11th Street
Kansas City, Missouri 64105
(816) 474-6600

Counsel of Record for Amicus Curiae Gulf & Great Plains Legal Foundation

September 9, 1983

(Other Counsel on Inside Cover)

R. L. Montgomery, Inc., 908 Cherry Street, Kansas City, Mo. 64106, (816) 421-0...

HONORABLE JOHN STEVEN CLARK
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

TABLE OF CONTENTS

Table of Authorities II

Interest of Amici Curiae IV

Summary of Argument 1

Argument 3

I. The exclusionary rule is a judicially created remedy only, and is not constitutionally mandated to protect Fourth Amendment rights 3

II. The exclusionary rule does not accomplish the main purposes for which it was implemented, but instead leads to major dysfunctions in the criminal justice system 10

III. A good faith exception, or broader exception tailored to practical needs and the need for a fair trial, would substantially reduce some of the most important costs of the exclusionary rule 14

Conclusion 19

TABLE OF AUTHORITIES

Cases

Adams v. New York, 192 U.S. 585 (1904) 4, 5
Arkansas v. Sanders, 442 U.S. 753 (1979) 15
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 8
Boyd v. United States, 116 U.S. 616 (1886) 4
Bumper v. North Carolina, 391 U.S. 543 (1968) 7
Coolidge v. New Hampshire, 403 U.S. 443 7
Desist v. United States, 394 U.S. 244 (1969) 8
Elkins v. United States, 364 U.S. 206 (1960) 10, 12
Irvine v. California, 347 U.S. 128 (1954) 11
Kaufman v. United States, 394 U.S. 217 (1969) 7
Linkletter v. Walker, 381 U.S. 618 (1965) 8
Mapp v. Ohio, 367 U.S. 643 (1961) ..... *passim*
Michigan v. Tucker, 417 U.S. 433 (1974) 16
Robbins v. California, 453 U.S. 420 (1981) 15
Scott v. United States, 435 U.S. 128 (1978) 7
Simmons v. United States, 390 U.S. 377 (1968) 7
Stone v. Powell, 428 U.S. 465 (1976) 7, 8, 13, 15
United States v. Calandra, 414 U.S. 338 (1974) 7, 8
United States v. Ceccolini, 435 U.S. 268 (1978) 8
United States v. Chadwick, 433 U.S. 1 (1977) 15
United States v. Havens, 446 U.S. 620 (1980) 8
United States v. Janis, 428 U.S. 433 (1976) 8, 11, 12
United States v. Peltier, 422 U.S. 531 (1975) 10
United States v. Ross, 102 S. Ct. 386 (1981) 15
Weeks v. United States, 232 U.S. 383 (1914) 4, 6, 9
Williams v. United States, 401 U.S. 646 (1971) 8
Wolf v. Colorado, 338 U.S. 25 (1949) 5, 6, 7, 8, 9, 11

Other Authorities

Comment, 23 S. Tex. L. Rev. 693 (1982) 17

128 Cong. Rec. S2417 (daily ed. March 18, 1982) 9, 15

128 Cong. Rec. S11338 (daily ed. Sept. 13, 1982) 9

Gallup Opinion Index Rep., No. 33 (1968) 16-17

Gallup Opinion Index Rep., No. 45 (1969) 17

D. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970) 11

J. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973) 11

M. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L. J. 531 (1982) 13

M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule* (National Legal Center for the Public Interest, 1982) [*reprinted at* 94 F.R.D. 211 (1982)] 13

INTEREST OF AMICI CURIAE

Amicus the State of Arkansas, as a sovereign state, has a strong interest in the outcome of this case. In maintaining a rational and effective system of criminal justice, the state has a strong concern for protecting its citizens from criminal activity, as well as in seeing that the constitutional right of its citizens to be free of unreasonable searches and seizures is safeguarded.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the maintenance of a rational system of criminal justice, the preservation of the free enterprise system, and the protection of individual and constitutional rights. The Foundation has appeared as amicus curiae in a number of cases before this Court, including several cases relating to criminal and constitutional law.

No. 82-963

In the Supreme Court of the United States

October Term, 1983

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

vs.

OSBORNE SHEPPARD,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF OF AMICI CURIAE, THE STATE OF ARKANSAS AND GULF & GREAT PLAINS LEGAL FOUNDATION, IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

The Court has granted certiorari in three cases—*Massachusetts v. Sheppard, Colorado v. Quintero,* and *U. S. v. Leon*—which all present the potential of creating a "good faith" exception to the exclusionary rule. Constitutional jurisprudence prior to *Mapp v. Ohio,* 367 U.S. 643 (1961), expressly negatived any assumption that the exclusionary rule was mandated by the Fourth Amendment as applied to the states by the Fourteenth Amendment. The holding in *Mapp* that the exclusionary rule was constitutionally required by the Fourth Amendment was

agreed to only by four justices, and subsequent decisions of this Court have undermined any basis for the position that the exclusionary remedy is constitutionally required. The Court has refused to apply it in situations where it would have been applied had it been of constitutional dimension, and has refused to apply it retroactively, both of which are inconsistent with the notion that it is constitutionally mandated. Several justices have expressly stated that the exclusionary remedy is not of constitutional dimension, and this view is concurred in by the current President and a number of members of Congress.

Empirical research regarding the deterrent effect on the police of the exclusionary rule is inconclusive at best. However, the serious costs imposed by the exclusionary rule are virtually indisputable. Most serious among these are the freeing of dangerous criminals, the lack of proportionality between the violation and the remedy, and the consequent disrespect for the administration of justice which is engendered by the exclusionary rule.

Given the extreme complexity of Fourth Amendment search and seizure law, it is unrealistic to expect police officers to be able to apply it flawlessly under the difficult conditions in which they must work. Furthermore, the deterrence rationale for the exclusionary rule loses much of its force when good faith on the part of police officers is present. An exception to allow illegally seized evidence to be admitted would significantly improve the truth-seeking function of criminal trials, and diminish the degree to which the guilty go free. A more flexible test, in which factors such as the seriousness of the Fourth Amendment violation, the seriousness of the crime, and the centrality of the evidence in question could be considered, would provide a much-needed balance between the enforcement of the Fourth Amendment and the protection of society.

ARGUMENT

I. THE EXCLUSIONARY RULE IS A JUDICIALLY CREATED REMEDY ONLY, AND IS NOT CONSTITUTIONALLY MANDATED TO PROTECT FOURTH AMENDMENT RIGHTS.

Each of the three cases in which the Court has granted certiorari—*Massachusetts v. Sheppard, Colorado v. Quintero, and U. S. v. Leon*—presents in different form a similar issue: must evidence obtained contrary to the Fourth Amendment's protections against unreasonable searches and seizures automatically be excluded, or might an exception be made where the police officer acted reasonably and in good faith? Critical to the resolution of this issue is an examination of the constitutional and theoretical underpinnings of *Mapp v. Ohio*, 367 U.S. 643 (1961), the case which first imposed the exclusionary rule on the several states. *Mapp* purported to find a constitutional basis for the application of the exclusionary rule to the states. If the exclusionary rule is rooted in the Constitution, a considerably different question is presented than if the rule is merely one of practical expediency, which may be changed according to the lessons of experience. This brief will demonstrate that, in the light of constitutional jurisprudence before and after the *Mapp* decision, the attempt in *Mapp* to ground the exclusionary rule in the Fourth Amendment stands out as an anomaly. Logic and this Court's other decisions show that the exclusionary rule is only one means which may be used to ensure that the Fourth Amendment's guarantees will be respected, and is not itself constitutionally mandated. As such, it may be modified by the Court to bring it in harmony with the dictates of experience and the ends of justice.

Before analyzing *Mapp* and subsequent decisions, a brief review of the prior history of the exclusionary rule may be helpful.

For the first century of our nation's existence, neither this Court nor the other federal courts held that the suppression of improperly obtained evidence in criminal trials was either necessary or proper to implement the Fourth Amendment protections against unreasonable searches and seizures. The first intimation that such evidence might be suppressed under the Fourth Amendment came in *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd* held that, in a federal proceeding, certain individuals could not be compelled by order of the court to produce private papers which would be incriminating to them. Though the Court discussed the Fourth Amendment at some length, the case appeared to be decided principally upon Fifth Amendment grounds, since no actual search or seizure had taken place. Nevertheless the case is significant as providing the first suggestion, halfway through the history of this country, that pertinent evidence might be withheld on Fourth Amendment grounds in a proceeding related to enforcement of criminal statutes.

It is significant that, eighteen years later, the Supreme Court in reviewing a criminal prosecution expressly reaffirmed the existing common law rule that a trial court has no justification under the Fourth Amendment for inquiring into the means by which evidence was obtained. *Adams v. New York*, 192 U.S. 585 (1904). *Adams* expressly distinguished *Boyd* as a Fifth Amendment case, and the authorities cited in *Adams* show that this refusal to suppress valid evidence was the uniform and prevailing rule.

Weeks v. United States, 232 U.S. 383 (1914), is widely regarded as the case which first applied the exclusionary

rule to federal agencies. In that case, the defendant's personal effects and papers had been seized by government agents without a warrant, and not pursuant to an arrest. The defendant filed a petition to have such property returned to him prior to the trial. The Supreme Court held that the refusal by the trial court to return all of such effects and papers violated the Fourth Amendment. The Supreme Court recognized the rule in *Adams* that the trial court should not inquire into the origin of evidence at trial, but held that the defendant had the right prior to trial to have his property returned to him. The practical effect, therefore, was to prevent the use of such evidence at trial.

The Fourth Amendment's guarantee against unreasonable searches and seizures was extended to the states through the Fourteenth Amendment only as recently as 1949. In the case which created that extension, *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court nevertheless expressly refused to impose a requirement on the states that the Fourth Amendment be implemented through the remedy of the exclusionary rule. The Court enumerated the common law and statutory protections then provided by the states to punish and deter Fourth Amendment violations, and to compensate victims of such violations, and concluded:

> Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. *Id.* at 31.

The Court held that the exclusionary remedy established in *Weeks* was a "matter of judicial implication" and was "not derived from the explicit requirements of the Fourth Amendment." *Id.* at 28. Noting that men "with a complete devotion to the right of privacy" might differ regarding the need for the exclusionary rule, and that most of the English-speaking world does not regard that remedy as vital to such protection, the Court decided that it must "hesitate to treat this remedy as an essential ingredient of the right." *Id.* at 28-29.

To the extent that *Wolf* refused to impose such a requirement on the states, it was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961). Though the effect of *Mapp* was clearly to impose a requirement on the states that they employ the exclusionary rule, it is noteworthy that in *Mapp* only four Justices found that the exclusionary remedy itself was compelled by the Fourth Amendment. Justice Stewart concurred in the result without reaching "the merits of the constitutional issue which the Court today decides." *Id.* at 672. Justices Harlan, Frankfurter and Whittaker filed a strong dissent. Justice Black, concurring in result, stated that he was:

> not persuaded that the Fourth Amendment standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. *Id.* at 661-662.

Justice Black based his concurrence on a joint interpretation of the Fourth and Fifth Amendments. *Id.* at 662. It is

significant that Justice Black had concurred in the *Wolf* decision, that his unique interpretation in *Mapp* failed to garner support in later decisions of the Court, and that in later decisions he made it clear that his concurrence in *Mapp* was based upon the Fifth Amendment, not the Fourth. As he stated in dissent in *Coolidge v. New Hampshire*, 403 U.S. 443, 496-97:

> The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation. * * * The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence.

See also, e.g., Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting); *Bumper v. North Carolina*, 391 U.S. 543, 560 (1968) (Black, J., dissenting); *Simmons v. United States*, 390 U.S. 377, 397 (1968) (Black, J., concurring and dissenting).

On several occasions since *Mapp*, the Court has drawn a distinction between the finding of a Fourth Amendment violation, and the appropriate remedy for that violation. Speaking for the Court, Justice Rehnquist recognized a distinction urged by the Government between "[w]hat is necessary to establish a . . . constitutional violation and what is necessary to support a suppression remedy once a violation has been established." *Scott v. United States*, 435 U.S. 128, 135 (1978). The Court has indicated that the exclusionary rule is only a "judicially created remedy" rather than a "personal constitutional right." *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974). If the exclusionary rule were

part and parcel of the Fourth Amendment, and created a personal constitutional right in every person who was the victim of an illegal search or seizure, then the fruits of the search or seizure should not be able to be used against him in any type of proceeding. But the Court has almost uniformly refused to extend the exclusionary rule to situations other than criminal trials. *See, e.g., Stone v. Powell*, 428 U.S. 465, 482 (1976) (habeas corpus proceedings); *United States v. Janis*, 428 U.S. 433, 454 (1976) (civil suit by government); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (grand jury proceedings).

Even in a criminal trial, the remedy of exclusion is not absolute. *United States v. Havens*, 446 U.S. 620 (1980) (impeachment of statements made by defendant on cross-examination); *United States v. Ceccolini*, 435 U.S. 268 (1978) (voluntary testimony by live witnesses). In several major cases, the Court has also declined to give retroactive effect to the exclusionary rule when decisions of the Court have extended the reach of Fourth Amendment protections. *Williams v. United States*, 401 U.S. 646 (1971); *Desist v. United States*, 394 U.S. 244 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965). None of the holdings of these cases is consistent with the theory that the exclusionary rule is of constitutional dimension.

If the exclusionary rule were of constitutional dimension, it would certainly be beyond the power of Congress to change it. However, as long ago as 1971, the Chief Justice called upon Congress to pass a statute providing, *inter alia*, "that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting). In *Wolf*, 338 U.S. at 33, Mr. Justice Frankfurter expressly

recognized that a "different question" would be presented if Congress were to pass a statute purporting to negate the *Weeks* doctrine as it respects federal agencies, or if Congress attempted to make the exclusionary rule binding upon the states by statute. In the same case, Mr. Justice Black, concurring, stated that he felt it to be the "plain implication" of the Court's opinion that the exclusionary rule is "not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39-40.

The President and at least certain members of Congress are of the same view. On March 18, 1982, Senators Thurmond and DeConcini introduced on behalf of the Administration a bill to provide a good faith exception to the exclusionary rule. 128 Cong. Rec. S2417 (daily ed. March 18, 1982). On September 13, 1982, the Criminal Justice Reform Act of 1982 was introduced in the Senate on behalf of the Administration. Among other things, it also contained a statutory good faith exception. 128 Cong. Rec. S11338 (daily ed. Sept. 13, 1982). The message by President Reagan accompanying that bill noted that although "the argument for retaining the exclusionary rule in any form is, at best, tenuous" the bill would at least eliminate application of the rule "in those cases in which it most clearly has no deterrent effect." *Id.* Though this Court is, of course, the final arbiter of whether the exclusionary rule is constitutionally based, the rule announced in *Mapp* that it is constitutionally required appears to have received as little credence in the executive and legislative branches as it has implicitly received in the later decisions of the Court.

In summary, the exclusionary rule is a rather late development in Fourth Amendment jurisprudence, and the leading case, *Mapp v. Ohio*, contained no clear or persuasive

constitutional mandate for the remedy of exclusion. Subsequent court opinions have emphasized that the exclusionary rule does not create a personal constitutional right, but is instead merely a judicially created remedy. The Court has, for the most part, declined to extend that remedy into areas other than the direct admission of evidence in criminal prosecutions. The reasonable inference is that the exclusionary rule, having been created by the Court as a prudential remedy, can also be changed by this Court if the remedy is seen not to have achieved its main purpose, or is seen to have created other undesirable effects. We therefore turn to a discussion of the purposes underlying the rule, and the severe, negative consequences which it has created.

II. THE EXCLUSIONARY RULE DOES NOT ACCOMPLISH THE MAIN PURPOSES FOR WHICH IT WAS IMPLEMENTED, BUT INSTEAD LEADS TO MAJOR DYSFUNCTIONS IN THE CRIMINAL JUSTICE SYSTEM.

It is now well recognized that the overriding purpose of the exclusionary rule, if not its sole purpose, is the deterrence of illegal searches and seizures by police. In *Mapp v. Ohio*, 367 U.S. 643 (1961), Justice Clark stated that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). References have also been made to a supposed purpose of preserving "judicial integrity"—that is, preventing the judicial process from becoming sullied by the use of unconstitutionally obtained evidence. *See discussion in United States v. Peltier*, 422 U.S. 531, 536-39 (1975). However, most decisions have made it clear that the practical rationale for the exclusionary rule is

deterrence, and that the rule must survive or fall on that basis. *See, e.g., United States v. Janis*, 428 U.S. 433, 446-54 (1976).

Though a number of empirical studies have been performed to determine whether the exclusionary rule does in fact deter illegal conduct, the results have been inconclusive. One of the more comprehensive empirical studies examined statistics and other facts relating to Motions to Suppress in the city of Chicago over a twenty-year period. J. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973). The study covered the years 1950-1970, a period almost evenly divided between the pre-*Mapp* and post-*Mapp* years. The author questioned whether the exclusionary rule in fact had any deterrent effect on police officers, noting that "[t]he individual police officer who is involved in a Motion to Suppress often leaves the courtroom confused rather than clarified as to what his proper conduct should be." *Id.* at 276. Perhaps the most thoroughgoing of such studies is D. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970). This study reviewed most of the empirical data which had previously been published on this subject, together with certain new data. The author concluded that the data provided "little support for the proposition that the exclusionary rule discourages illegal searches and seizures . . . ." *Id.* at 667. The article closes with a call for the abolition of the exclusionary rule. *Id.* at 754.

In this respect, little has changed in the thirty-five years since *Wolf* was decided. In 1954, Mr. Justice Jackson stated: "What actual experience teaches we really do not know." *Irvine v. California*, 347 U.S. 128, 135 (1954). One year prior to the *Mapp* decision, Mr. Justice Stewart ad-

mitted that "empirical statistics are not available" to show that the exclusionary rule deters unlawful searches and seizures. *Elkins v. United States*, 364 U.S. 206, 218 (1960). After reviewing the literature, Mr. Justice Blackmun, writing for the Court, more recently expressed serious doubts about the empirical underpinnings of the rule. *United States v. Janis*, 428 U.S. 433, 446-54 (1976).

On the other hand, it has become increasingly clear that the exclusionary rule has a number of severe adverse consequences. One leading commentator on the exclusionary rule, Judge Malcolm R. Wilkey of the Court of Appeals for the District of Columbia, has identified no fewer than twelve separate costs of the exclusionary rule. Judge Wilkey's list is as follows:

1. "The criminal is to go free because the constable has blundered."

2. Only the undeniably guilty benefit from the exclusionary rule, while innocent victims of illegal searches have neither protection nor remedy.

3. The exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies.

4. The disposition of exclusionary rule issues constitutes an unnecessary and intolerable burden on the court system.

5. The exclusionary rule forces the Judiciary to perform the Executive's job of disciplining its employees.

6. The misplaced burden on the Judiciary deprives innocent defendants of due process.

7. The exclusionary rule encourages perjury by the police.

8. The exclusionary remedy makes hypocrites out of judges.

9. The high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens.

10. The exclusionary rule is applied with no sense of proportion to the crime of the accused.

11. The exclusionary remedy is applied with no sense of proportion to the misconduct of the officer.

12. All of the above costs result inevitably in greatly diminished respect for the judicial process, lawyers and laymen alike.

See M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule* (National Legal Center for the Public Interest, 1982) [*reprinted* at 95 F.R.D. 211 (1982)]; M. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L. J. 531 (1982).

The Court itself has identified five major costs of the exclusionary rule in *Stone v. Powell*, 428 U.S. 465, 489-91 (1976). The Court considered the following five costs to be "well known":

1. "[T]he focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."

2. "[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."

3. Application of the rule "deflects the truth finding process and often frees the guilty."

4. "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is

contrary to the idea of proportionality that is essential to the concept of justice."

5. Because of these costs, the rule may have the "effect of generating disrespect for the law and administration of justice."

All of these costs identified by the Court and Judge Wilkey are significant. However, perhaps three costs are the most significant:

1. By suppressing reliable and oftentimes essential evidence, the rule allows guilty and dangerous criminals to go free;

2. By suppressing evidence regardless of the seriousness of the violation of Fourth Amendment rights, or the seriousness of the crime, the rule is contrary to the idea of proportionality that is essential to the concept of justice; and

3. By freeing dangerous criminals without regard to guilt, and diverting the inquiry at trial to technicalities, the rule generates disrespect for the law and the administration of justice.

The effect of a good faith exception or similar exception upon these costs will be discussed in Part III.

III. A GOOD FAITH EXCEPTION, OR BROADER EXCEPTION TAILORED TO PRACTICAL NEEDS AND THE NEED FOR A FAIR TRIAL, WOULD SUBSTANTIALLY REDUCE SOME OF THE MOST IMPORTANT COSTS OF THE EXCLUSIONARY RULE.

Of all of the many costs of the exclusionary rule, perhaps the single most serious is the societal cost of permitting unquestionably guilty criminals to go free on the

basis of abstruse technicalities. The literal impossibility of expecting police officers to interpret perfectly the arcane rules of search and seizure was vividly described in the message from the Assistant Attorney General which accompanied S. 2231, the bill to establish a good faith exception. That message mentioned the decision in *Robbins v. California*, 453 U.S. 420 (1981), and went on to state:

> In *Robbins*, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision based largely on two previous cases, *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in *Robbins* in 1975. The *Robbins* decision overruled previous decisions of the trial and appellate courts in California that the search was valid. When finally decided, 14 judges had reviewed the search; seven found it valid; seven invalid. To add to the confusion, less than three months after it decided *Robbins*, the Supreme Court granted certiorari in *United States v. Ross*, 102 S. Ct. 386 (1981) and asked both sides to address the question of whether *Robbins* should be reconsidered. It is unrealistic to think that the exclusionary rule can motivate even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating, especially when the examination to test his knowledge is suddenly presented in a potential life or death situation. 128 Cong. Rec. S2417 (daily ed. March 18, 1982).

Given the inevitable complexity of Fourth Amendment search and seizure law, police officers must be given some degree of latitude in applying it. Justice White has forcefully argued for a "good faith" exception in his dissent in *Stone v. Powell*, 428 U.S. 465, 536 (1976). The Court

has also recognized that deterrence fails as a rationale when good faith is present:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. Michigan v. Tucker,* 417 U.S. 433, 447 (1974). [emphasis added]

An exception to the exclusionary rule which would allow evidence obtained in violation of the Fourth Amendment to be used at trial, when the officer's actions were performed reasonably and in good faith, would significantly improve the truth-seeking process in those areas where the law is unclear, or is subsequently changed. By doing so, it would substantially mitigate the serious cost of allowing criminals to go free, and thereby minimize the disrespect for the criminal process which this tangle of technicalities has produced.

The societal costs of the exclusionary rule are not of course limited to the actual victimization and increased crime caused by the freeing of criminals. Disrespect for the courts results when the public perceives that there is only an attenuated relationship between guilt and conviction. Survey data bear this out. In April of 1965, when the effects of the Supreme Court's constitutional reforms of criminal procedure were just beginning to be felt, only 48% of the American public believed that the courts did not deal harshly enough with criminals. Gallup Opinion

Index Rep., No. 33 (1968). By February of 1968 that figure had risen to 63%, and by March of 1969 had increased to 75%. Gallup Opinion Index Rep., No. 33 (1968); Gallup Opinion Index Rep., No. 45 (1969). According to figures cited by Attorney General William French Smith, the percentage of the public which felt that the courts do not deal harshly enough with criminals had reached 90% by 1981. Comment, 23 S. Tex. L. Rev. 693, 700, n. 57 (1982). Though the exclusionary rule is certainly not entirely responsible for this perception of undue judicial leniency, it cannot have failed to have contributed to it.

At present, the determination of a Fourth Amendment violation on a Motion to Suppress is automatically tied to the exclusionary remedy. If a violation is found, the evidence is suppressed. Creating a good faith exception would divorce the issues of (1) finding a violation, and (2) deciding whether the evidence should be admitted. Since a two-step process will therefore be necessary, amici would suggest that any exception created by this Court might well address more than the reasonableness and good faith of the officer's conduct. Specifically, a more flexible exception would allow the trial court to consider other factors which will bring some proportionality to decision-making in this area. For example, assuming a Fourth Amendment violation has been found, the trial court should be able to consider factors such as the following in deciding whether the evidence should be suppressed:

1. Despite the existence of a Fourth Amendment violation, was the action of the officer nevertheless taken reasonably and in good faith?

2. How central is the evidence in question to determining guilt or innocence?

3. How serious was the invasion of the defendant's Fourth Amendment rights?

4. How serious was the crime, and, if the charge were to be proven, how dangerous is the alleged offender likely to be to society?

There are many types of evidentiary determinations in which the trial court must weigh the probativeness and value of the evidence against extrinsic policy concerns. Amici suggest that if the exclusionary rule is to be retained, it would be much more salutary to create a similar rule in cases of alleged Fourth Amendment violations, so that the critical interests of protecting society can be weighed against the deterrence which the exclusionary rule seeks to advance.

It is perhaps not necessary for this Court to determine the exact content of such a test which could be applied by state courts. If the exclusionary rule is not constitutionally mandated, this Court is certainly empowered to formulate a remedy for the federal courts under its general supervisory powers. But, if the rule is not of constitutional dimension, it is difficult to ascertain what would authorize this Court to develop a detailed rule for state courts. The Court is obviously empowered to ensure that the states enforce the strictures of the Fourth Amendment, as applied to the states through the Fourteenth. Nevertheless, there is certainly a great deal of room for experimentation and differences in judgment as to the contours of the remedy or remedies to be implemented. Thus, if the exclusionary rule is to be retained as applied to the states, amici would urge the Court to do no more than establish general guidelines for the states to observe in establishing a good faith exception, or in establishing a more flexible exception which would diminish the present costs of the exclusionary rule.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

WILKES C. ROBINSON*
DAN M. PETERSON
GULF & GREAT PLAINS LEGAL FOUNDATION
1000 Brookfield Building
101 West 11th Street
Kansas City, Missouri 64105
(816) 474-6600

Counsel of Record for Amicus Curiae Gulf & Great Plains Legal Foundation

HONORABLE JOHN STEVEN CLARK
Attorney General of Arkansas
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

COPY

FILED
SEP 7 1983
ALEXANDER L. STEVAS, CLERK

No. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

OSBORNE SHEPPARD,

Respondent.

On Writ of Certiorari To The
Supreme Judicial Court Of
Massachusetts

BRIEF OF AMICUS CURIAE ON BEHALF OF THE PETITIONER

Appellate Committee of the
California District
Attorneys Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

HARRY B. SONDHEIM, Head Deputy
Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

849 South Broadway, 11th Floor
Los Angeles, California 90014-[illegible]
Telephone: (213) 974-5823

Attorney for Amicus Curiae

TOPICAL INDEX

	Pages
BRIEF OF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	2-5
SUMMARY OF ARGUMENT	5-7
ARGUMENT	
A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED	7-25
CONCLUSION	25-29

TABLE OF AUTHORITIES

Cases	Pages
Boyd v. United States (1886) 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746	9
Franks v. Delaware (1978) 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674	21
Illinois v. Gates (1983) ___ U.S. ___, 103 S.Ct. 2317	2, 12, 14, 20
Mapp v. Ohio (1961) 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684	9, 10, 11
Massachusetts v. Sheppard (1982) ___ N.E.2d ___, 387 Mass. 488	19
Michigan v. DeFillippo (1979) 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627	15
Michigan v. Tucker (1974) 417 U.S. 433, 41 L.Ed.2d 182, 94 S.Ct. 2357	16
Rakas v. Illinois (1978) 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421	14, 16

Rochin v. California (1952) 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 — 9

Stone v. Powell (1976) 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 — 10, 12, 13, 15, 16

United States v. Calandra (1974) 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 — 11, 12, 14, 16, 19, 23

United States v. Ceccolini (1978) 435 U.S. 268, 55 L.Ed.2d 268, 92 S.Ct. 1054 — 16

United States v. Janis (1976) 428 U.S. 433, 49 L.Ed.2d 1046, 96 S.Ct 3021 — 11, 13, 14, 15

United States v. Payner (1980) 447 U.S. 727, 65 L.Ed.2d 468, 100 S.Ct. 2439 — 14, 16, 19

United States v. Peltier (1975) 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313 — 11, 12, 15

United States v. Ventresca (1965) 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 — 20, 21

Rules

United States Supreme Court Rule 36(2) 1

United States Supreme Court Rule 36(4) 4

Constitutions

California Constitution

Article I, §28(a) 26, 27
Article I, §28(d) 25

United States Constitution

Fourth Amendment 9, 10, 20
Fifth Amendment 9, 10

Miscellaneous

Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J.Crim. L. & Criminology 635 (1978) 8

Bringegar, Limiting the Application of the Exclusionary Rule - The Good Faith Exception, 34 Vand. L. Rev. 213 (1981) 8

Gifford, Constitutional Law: Search and Seizure - The Role of Police Officer Good Faith in Substantive

Fourth Amendment Doctrine - Michigan v. DeFillippo (1979) 443 U.S. 31, 55 Wash.L.Rev. 849 (1980) 8

Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027 (1974) 8

Leonard, The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice, 4 Whittier L.R. 33 (1981) 8

National Institute of the United States Department of Justice (Criminal Justice Research Report, The Effect of the Exclusionary Rule, Study in California, December, 1982) 16, 18, 19

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970) 13

No. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

OSBORNE SHEPPARD,

Respondent.

On Writ Of Certiorari To The
Supreme Judicial Court of
Massachusetts

BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate Committee of the California District Attorneys Association and Robert H. Philibosian, District Attorney of Los Angeles County, are filing this brief accompanied by written consent of all parties to the case pursuant to Supreme Court Rule 36(2).

/ / /

INTEREST OF AMICUS CURIAE[1]

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorneys' offices throughout the state, for the purpose of presenting their views on

---

[1] Amicus is seeking leave to file an amicus brief on behalf of the Petitioner in the case of The State of Colorado v. Quintero, No. 82-1711, which addresses the good faith exception to the exclusionary rule under circumstances where a police officer acts without a warrant or other judicial mandate and seizes evidence and where the officer's conduct is both subjectively and objectively reasonable. Although this Court has accepted for hearing a third case, United States v. Leon, 82-1771, Amicus has not filed a motion for leave to file an amicus brief therein since the Amicus believes that the search and seizure made incident to the execution of a search warrant in United States v. Leon, supra, is independently lawful under authority of Illinois v. Gates (1983) ___ U.S. ___, 103 S.Ct. 2317.

behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California. Accordingly, the Committee has decided to move for leave of this court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California (see Supreme Court Rule

36(4)).

The central day-to-day function of the offices whose members constitute the California District Attorneys Association is to aid in the successful discovery, apprehension, and prosecution of those who commit crimes. Therefore, the Association and its membership have a vital interest in urging this Court to adopt the good faith exception to the exclusionary rule as set forth herein. It is felt by Amicus that such a rule is a reasonable modification on the present rule excluding previously seized relevant evidence.

Amicus curiae has researched and analyzed the development of the exclusionary rule. Amicus has studied the opinion of the

Supreme Judicial Court of Massachusetts. Amicus is intimately familiar with the impact of the exclusionary rule on prosecution of crime in California. It is felt that Amicus' analysis of the issues, with specific reference to the experience in California, will be of assistance to this Court in its resolution of the issues of law presented by this case.

SUMMARY OF ARGUMENT

This brief urges that where a police officer, in good faith, seeks and obtains judicial authorization to search and seize property pursuant to a search warrant, the evidence obtained should not be suppressed.

Unfettered application of the rule which suppresses admittedly

relevant evidence has a deleterious effect upon successful prosecution of crime. A California study of cases rejected for search and seizure considerations reflects that almost half of those individuals whose cases were rejected were rearrested within two years. That same California experience disclosed that almost one third of all felony drug arrests sampled were rejected at the time these cases were presented for filing to the prosecutor due to problems with search and seizure.

California voters have recognized the adverse impact upon public safety of excluding relevant evidence. The voters of this State have adopted an amendment to their Constitution which limits exclusion of relevant evidence to the

requirements of the federal constitution.

The objectives of the exclusionary rule, deterrence of future police conduct and assurance of "judicial integrity", are not furthered in instances when law enforcement seek and obtain judicial order for search and seizure of evidence. Indeed, more protection is afforded when officers are judicially encouraged to seek search warrants. It is urged that this Court adopt the good faith exception to the exclusionary rule.

ARGUMENT

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED

The evolution of the exclusionary rule reflects the development of a concept which is by

no means monolithic or without controversy (see generally Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027) (Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978); Gifford, Constitutional Law: Search and Seizure - The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine - Michigan v. DeFillippo (1979) 443 U.S. 31, 55 Wash.L.Rev. 849 (1980); Bringegar, Limiting the Application of the Exclusionary Rule - The Good Faith Exception, 34 Vand.L.Rev. 213 (1981); Leonard, The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice, 4 Whittier L.R. 33 (1981)). Initially

conceived as relating both to the Fourth and Fifth Amendment (Boyd v. United States (1886) 116 U.S. 616, 632, 634-635, 6 S.Ct. 524, 29 L.Ed. 746), the exclusionary rule had been applied to the states under precepts of due process in Rochin v. California (1952) 342 U.S. 165, 186, 96 L.Ed. 183, 72 S.Ct. 205, until in Mapp v. Ohio (1961) 367 U.S. 643, 655, 6 L.Ed.2d 1081, 1090, 81 S.Ct. 1684 a plurality opinion of this Court stated "that all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in a state court". However, only four justices subscribed to the view that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in

state criminal trials.[2]

---

[2] Only four of the five Supreme Court Justices who comprised the majority in Mapp v. Ohio, supra, 367 U.S. 643, were of the opinion that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in state criminal trials. The majority opinion was authored by Justice Clark (id. at 643), the concurring opinion was by Justice Douglas (id. at 666). Justice Black stated in a concurring opinion that the Fourth Amendment, standing alone, did not bar from evidence items seized in violation of its commands. Only when the Fourth Amendment's ban against unreasonable searches and seizures is considered in conjunction with the Fifth Amendment's ban against self-incrimination did a constitutional basis emerge which required the exclusionary rule (id. at 661-662; see Justice Harlan's dissenting opinion (id. at 672)). Justice Stewart expressed no view on the merits of the constitutional issue before the Court. He would have reversed on the ground that the Ohio statute under which the defendant was convicted violated constitutional guarantees of free thought and expression (Id. at 682). Note that Justice Powell, writing for the six member majority in Stone v. Powell (1976) 428 U.S. 465, 49 L.Ed.2d 1046, 96 S.Ct. 3021), stated with respect to Mapp: "Only four Justices adopted the view that the Fourth Amendment itself requires the

Moreover, subsequent to Mapp v. Ohio, supra, this Court has reiterated that the exclusionary rule is judicially created and is not constitutionally mandated (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 571, 94 S.Ct. 613; United States v. Peltier (1975) 422 U.S. 531, 538, 45 L.Ed.2d 374, 95 S.Ct. 2313; United States v.

---

exclusion of unconstitutionally seized evidence in state criminal trials." (Id. 428 U.S 465, 484 n. 21).

Janis (1976) 428 U.S. 433, 459-460, 49 L.Ed.2d 1046, 96 S.Ct. 3021; Stone v. Powell (1976) 428 U.S. 465, 482, 49 L.Ed.2d 1067, 96 S.Ct. 3037). The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim (United States v. Calandra, supra, 414 U.S. at 347). Rather the rule's prime purpose has been to deter future unlawful police conduct (United States v. Calandra, supra, 414 U.S. at 347; United States v. Peltier, supra, 422 U.S. at 536; United States v. Janis, supra, 428 U.S. 446), although empirical studies have never confirmed that the rule is effective in this respect (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485; Illinois v. Gates, supra,

___ U.S. ___, 103 S.Ct. 2317, Justice White concurring).[3] A subordinate purpose of the exclusionary rule, assurance of "judicial integrity" by not admitting illegally seized evidence in certain criminal proceedings (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485), "does not mean that the courts must never admit evidence obtained in violation of the Fourth

---

[3] The most comprehensive study on the effectiveness of the deterrence purpose of the exclusionary rule is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970), which is discussed together with other studies in footnote 22 of the opinion in United States v. Janis, supra. After discussing the various studies this Court in Janis states: "The final conclusion is clear. No empirical research, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." (Id at 452.)

Amendment" (United States v. Janis, supra, 428 U.S. at 458, note 35). There is the recognition that the suppression of probative but tainted evidence exacts a costly toll upon the search for the truth in criminal proceedings (United States v. Payner (1980) 447 U.S. 727, 734, 65 L.Ed.2d 468, 476, 100 S.Ct. 2439; Illinois v. Gates, supra, ___ U.S. ___, 103 S.Ct. 2317, Justice White concurring). Thus, the rule is not applied where the defendant is not the direct recipient of the unlawful search (Rakas v. Illinois (1978) 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421). The exclusionary rule has not been extended to grand jury proceedings (United States v. Calandra, supra, 414 U.S. 338). It has been rejected in civil proceedings respecting the

return of unconstitutionally seized property (United States v. Janis, supra, 428 U.S. 433). The rule has been restricted in the area of relitigation of habeas corpus claims in federal courts (Stone v. Powell, supra, 428 U.S. 465). The application of the exclusionary rule is not required where law enforcement acts in good faith reliance upon a statute or ordinance which is subsequently held to be unconstitutional (United States v. Peltier (1975) 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313; Michigan v. DeFillippo (1979) 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627).

It has been repeatedly recognized by this Court that unbending application of the exclusionary rule undermines the

truth finding function of our criminal justice system (e.g. Rakas v. Illinois (1978) 439 U.S. at 137-138, 58 L.Ed.2d 387, 99 S.Ct. 421; United States v. Ceccolini (1978) 435 U.S. 268, 275-279, 55 L.Ed.2d 268, 92 S.Ct. 1054; Stone v. Powell (1976) 428 U.S. 465, 489-491, 49 L.Ed.2d 1067, 96 S.Ct. 3037; Michigan v. Tucker (1974) 417 U.S. 433, 450-451, 41 L.Ed.2d 182, 94 S.Ct. 2357); United States v. Calandra, supra, 414 U.S. at 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at 734, 65 L.Ed.2d at 476, 100 S.Ct. 2439).

A report by the National Institute of Justice of the United States Department of Justice (Criminal Justice Research Report,

The Effect of the Exclusionary Rule, Study in California, December, 1982) illustrates the extent to which the exclusionary rule exacts a severe price upon a society which seeks to protect itself from crime. That Criminal Justice Research report reveals that almost half the individuals in California whose cases were rejected for search and seizure problems were rearrested within two years. An analysis of the nature of the felony rearrests disclosed that although many rearrests were for drug crimes, the majority of the rearrests were for personal property crimes or other felony arrests (id. at 18). The report reflects that in the area of felony drug arrests, 32.5% of all felony drug arrests referred for prosecution to the Pomona Branch

Office of the Los Angeles County District Attorney's Office in 1981 were rejected at the time these cases were presented to the prosecutor for filing due to problems with search and seizure. A sample of drug cases submitted to the Central Office of the Los Angeles District Attorney disclosed a 29% rejection rate due to search and seizure problems (id. at pages 2, 13). Moreover, the report concluded that the data analyzed in the study tended to understate the net effect of the exclusionary rule (id. at page 9). In light of the toll the rule exacts from society, it is unjustifiable to exclude evidence seized incident to execution of a search warrant which was obtained in good faith.

The exclusionary rule "has

been restricted to those areas where its remedial objectives are thought most efficaciously served." (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at 734, 65 L.Ed.2d at 476, 100 S.Ct 2439). These objectives are not furthered in instances, as the case at bar, where police conduct is reasonable and in good faith.

In respect to the issuance and execution of search warrants, it is urged that where an officer, in good faith, seeks and obtains judicial sanction under warrant to search and seize property, the evidence obtained should not be suppressed. Massachusetts v. Sheppard (1982) ___ N.E.2d ___, 387 Mass. 488 exemplifies the necessity

for this rule. The Supreme Judicial Court of Massachusetts characterized the issue presented to be: "The question is whether an error of a magistrate, unrelated to police error, calls for application of the exclusionary rule." (Id., 387 Mass. at 503). This Court has recognized that police are encouraged to seek judicial authorization for searches and seizures whenever possible (United States v. Ventresca (1965) 380 U.S. 102, 105-106, 111-112, 13 L.Ed.2d 684, 85 S.Ct. 741). The Fourth Amendment's preference is for searches conducted pursuant to warrant (United States v. Ventresca, supra, 380 U.S. at 109, Illinois v. Gates, (1983) ___ U.S. ___, 103 S.Ct. 2317, 2331). Search warrants judicially command the search for and

seizure of items based upon the prior judicial determination that the search is lawful. When a law enforcement officer, in good faith, applies to a judge or magistrate for a search warrant, and, the affidavit for the warrant is considered before the warrant is issued, the police officer has thereby, done everything possible to comply with the dictates of the Fourth Amendment. As long as police, in good faith,[4] present to a judge or magistrate an affidavit describing all the facts known to them which they believe establishes probable cause for a search and seizure and the judge or magistrate

---

4 Where the affidavit contains false statements knowingly and intentionally or recklessly made, the application for warrant cannot be deemed to have been requested in good faith (see Franks v. Delaware (1978) 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674).

then issues a search warrant, the evidence recovered thereby should be admissible. The search thereunder occurs in a reasonable manner.

By requesting a search warrant the police have sought a judicial order to search for and seize evidence. The responsibility of the judge or magistrate now becomes to review and grant or deny the request for the search warrant. Society should not be punished once the police have acted in good faith and done everything reasonably possible to seek judicial sanction for their conduct. Good faith reliance on the warrant, once it is issued, should validate the search thereunder. The rules of the game should not be changed once the game is played.

Any inadequacies which are found subsequent to the issuance of the search warrant cannot be attributable to the police and thus the prime purpose of the exclusionary rule (deterrence of future unlawful police conduct) cannot be "efficaciously served" (United States v. Calandra, supra, 414 U.S. at 414) by suppressing the evidence. A secondary purpose of the exclusionary rule, assurance of "judicial integrity", is not undermined where the police have done everything possible in good faith to present a complete and accurate request for a judicial order to search for and seize evidence. Indeed, society will be better protected from unlawful conduct if the police are encouraged to obtain search warrants. Police

officers often have a choice as to whether they will engage in a search or seizure with or without a warrant. If the lawfulness of their actions is afforded protection when they use a warrant, it is more likely that they will seek warrants and that their activities will be judicially reviewed before they act rather than after. Ultimately, this Court must decide whether it is better to have judges and magistrates review affidavits for search warrants before searches are conducted or to have appellate review after the search (i.e. Monday morning quarterbacking). Those who are law abiding and need protection against unlawful police conduct would certainly be better protected by the former, rather than the latter. A

search of a law abiding person will never afford the judiciary with an opportunity for judicial review after the search is conducted because incriminating evidence by definition (i.e. law abiding), will not have been found.

CONCLUSION

In 1982 the voters of the State of California in a statewide primary election, adopted an initiative, Proposition 8, which modified the California Constitution so as to conform California rules respecting the admissibility of seized evidence to the federal constitutional model (Proposition 8, California Constitution, Article I, Section 28, subdivision (d)).[5] The

---

5 California Constitution, Article I, Section 28, subdivision (d) states:

People of this state recognized, in enacting that initiative, that society must be more effectively protected from crime (Proposition 8, California Constitution, Article I,

---

> "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

It was recognized that "[t]he measure [California Constitution, Article I, Section 28, subdivision (d)] could not affect federal regulations on the use of evidence" (California Ballot Pamphlet, Primary Election June 8, 1982, emphasis in original, Analysis by the Legislative Analyst, p. 32.)

Section 28, subdivision (a)).[6]

---

[6] California Constitution Article I, Section 28, subdivision (a) is a preamble to Proposition 8 which states:

> "The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights is a matter of grave statewide concern.
>
> The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.
>
> Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

Californians now look to this Court for the standard to be applied in respect to the admission of previously seized evidence. The Court should adopt the good faith

---

> To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

exception to the exclusionary rule.

Respectfully submitted on behalf of
the Appellate Committee of the
California District Attorney's
Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for the Appellate Committee
of the California District Attorneys
Association

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of Roderick W. Leonard, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 90014-3296; that the District Attorney is the amicus curiae on behalf of the Petitioner in

the above-entitled matter. On September 14, 1983, I served three copies of the foregoing on the following persons and Courts by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS
ROOM 1412
NEW COURT HOUSE
BOSTON MA 02108

SUFFOLK SUPERIOR COURT
FOR CRIMINAL BUSINESS
SEVENTH FLOOR
NEW COURT HOUSE
BOSTON MA 02108

/ / /
/ / /
/ / /
/ / /
/ / /
/ / /
/ / /
/ / /
/ / /

FRANCIS X. BELLOTTI
ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON MA 92108

ATTN: BARBARA A. H. SMITH
ASST. ATTY. GEN.
CHIEF, CRIMINAL
APPELLATE DIVISION

JOHN REINSTEIN, ESQ.
MASSACHUSETTS CIVIL
LIBERTIES UNION FOUNDATION
47 WINTER STREET
BOSTON MA 92108

Executed on September 14,

1983 at Los Angeles, California.

_____

MARK NAGAI

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Roderick W. Leonard, Deputy District Attorney, is a member of the bar of this Court. On September 14, 1983, under my supervision, Cecil Patterson, an employee of the office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid and via U. S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543

An amicus curiae brief in this matter was originally mailed (with service on the appropriate parties) on September 6, 1983 which is within the permitted time and, pursuant to a discussion with members of the Office of the Clerk of this Court is being resubmitted at this time to correct a technical defect.

RODERICK W. LEONARD

Nos. 82-1771, 82-963 and 82-1711

Office - Supreme Court, U.S.
FILED
NOV 23 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

ALBERTO ANTONIO LEON, ET AL., *Respondents.*

COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

—v.—

OSBORNE SHEPPARD, *Respondent.*

STATE OF COLORADO, *Petitioner,*

—v.—

FIDEL QUINTERO, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF FOR THE COMMITTEE ON CRIMINAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

Of Counsel:

JOHN H. DOYLE, III
666 Third Avenue
New York, New York 10017

JED S. RAKOFF
20 Broad Street
New York, New York 10005

RICHARD D. WEINBERG
919 Third Avenue
New York, New York 10022

BARBARA D. UNDERWOOD
210 Joralemon Street
Brooklyn, New York 11201

PETER L. ZIMROTH
Attorney for Amicus Curiae
80 Pine Street
New York, New York 10005
(212) 422-4030

QUESTION PRESENTED

Whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment should to any extent be modified so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

TABLE OF CONTENTS

	PAGE
Interest of the Amicus Curiae	2
Summary of Argument	2
Point I—The Exclusionary Rule Protects Significant Constitutional Rights and Values	3
A. The Exclusionary Rule Protects the Integrity of the Judicial Process	3
B. The Exclusionary Rule Encourages Lawful Conduct and Discourages Unlawful Action	7
Point II—To Engraft a "Reasonable Mistake" Exception upon the Exclusionary Rule Would Undercut Both the Functions of the Rule and the Values of the Fourth Amendment Itself	12
A. The "Reasonable Mistake" of the Office Should Not Immunize from Review the Legality of a Search	12
B. The "Reasonableness" Element of the "Reasonable Mistake" Exception Will Not Produce Meaningful Police Attention to Judicial Review of Fourth Amendment Violations Except Those Involving Obvious and Flagrant Misconduct	15
C. The Mere Issuance of a Warrant Should Not Immunize from Review the Legality of a Search	17
D. The Exclusionary Rule is Required by the Fourth Amendment Because it is the Only Remedy for Fourth Amendment Violations	20

PAGE

E. Occasional Erroneous Suppression Rulings Provide No Reason to Adopt a "Reasonable Mistake" Exception to the Exclusionary Rule 20

Conclusion 22

TABLE OF AUTHORITIES

Cases: PAGE

Alderman v. *United States*, 394 U.S. 165 (1969) 15, n.6

Boyd v. *United States*, 116 U.S. 616 (1885) 19

Elkins v. *United States*, 364 U.S. 206 (1960) 5

Entick v. *Carrington*, 19 Howell's State Trials 1029 (1765).....19, n.8

Harlow v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982) 20

Illinois v. *Gates*, 103 S.Ct. 2317 (1983) 14, n.4

Mapp v. *Ohio*, 367 U.S. 643 (1961)..... 5, 8

McNabb v. *United States*, 318 U.S. 332 (1943)..... 5

Olmstead v. *United States*, 277 U.S. 438 (1928) 8

Stone v. *Powell*, 428 U.S. 465 (1976).....14, n.4

Terry v. *Ohio*, 392 U.S. 1 (1968) 4, 6

United States v. *Calandra*, 414 U.S. 338 (1974).....15, n.6

United States v. *Havens*, 446 U.S. 620 (1980) 15, n.6

United States v. *Janis*, 428 U.S. 433 (1976) 7; 15, n.6

United States v. *Johnson*, 102 S.Ct. 2579 (1982)..... 16

United States v. *Karathanos*, 531 F.2d 26 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976) 18

Weeks v. *United States*, 232 U.S. 383 (1914) 5, 13

Wilkes v. *Wood*, 19 Howell's State Trials, 1153 (1763).....19, n.8

PAGE

Constitution and Statutes:

U.S. Const.:
Amend. IV ..... *passim*

42 U.S.C. § 1983 20

Miscellaneous Authorities:

Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S.Tex. L.J. 559 (1982) 12

Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681 (1974) 11

T.M. Cooley, *The Treatise on Constitutional Limitations* (1927) 19, n.9

Elliot's Debates on the Federal Constitution (1836) 19, n.9

Final Report of the Attorney General's Task Force on Violent Crime (1981) 13, n.3

Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate, 97 Cong. 1st and 2nd Sess. on S.101, S.751 and S.1995 (1981 and 1982) 10, 11

Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?*, 16 Creighton Law Review 565 (1983) 6, 19

Kamisar, *Is the Exclusionary Rule an "Illogical" or the "Unnatural" Interpretation of the Fourth Amendment?*, 62 Judicature 66 (1978) 8

LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (1978) 19, n.9

PAGE

M. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937) 19, n.8

Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 Georgetown L.J. 365 (1981) . 18, n.7; 19, n.10

Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments,* 44 Texas L.Rev. 939 (1966)..... 8

Oaks, *Studying the Exclusionary Rule in Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 37 U.Chi. L.Rev. 665 (1970) ... 11

W. Parker, *Police* (Springfield, Illinois: C.C. Thomas) (Wilson ed. 1957) 8

Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 Col. L.Rev. 1365 (1983).....10, 20

T. Taylor, *Two Studies in Constitutional Interpretation* 38-44 (1968) 19, n.8

Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition,* 35 Vanderbilt L.Rev. 501 (1982).....14, n.5; 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1771, 82-963 and 82-1711

UNITED STATES OF AMERICA,

Petitioner,

—v.—

ALBERTO ANTONIO LEON, ET AL.,

Respondents.

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

—v.—

OSBORNE SHEPPARD,

Respondent.

STATE OF COLORADO,

Petitioner,

—v.—

FIDEL QUINTERO,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF FOR THE COMMITTEE ON CRIMINAL LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

Interest of the Amicus Curiae

This brief is respectfully submitted on behalf of the Committee on Criminal Law of the Association of the Bar of the City of New York.[1]

The Association of the Bar of the City of New York was established in 1871 "for the purposes of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession. . . ." (Charter, April 28, 1871). The Committee on Criminal Law is one of the Association's standing committees. Its jurisdiction includes evaluation and comment upon proposals affecting criminal law and procedure in the state and federal courts. The Committee is composed of attorneys in all parts of the legal profession who have broad experience in the field of criminal law. The Committee's concern about the maintenance of the exclusionary rule is based not only on its concern for the preservation of Fourth Amendment values but, more particularly, its concern for maintaining the distinctive role of the courts in declaring and enforcing constitutional principles.

Summary of Argument

The Committee on Criminal Law of the Association of the Bar of the City of New York respectfully submits this brief in order to urge the Court not to modify the exclusionary rule and, more particularly, not to adopt a so-called "reasonable mistake" exception. We believe that the exclusionary rule is vitally important in our system of constitutional government. First, the moral authority of our courts would be seriously undermined if they permitted their judgments in criminal cases to be based on evidence obtained in a manner which the courts

---

1 This brief is filed with the consent of all parties to these cases, pursuant to Rule 36.2 of the Rules of this Court.

themselves have declared to be in violation of the Constitution. Second, the exclusionary rule provides the occasion by which the courts articulate and transmit to the public and to the law enforcement community the doctrines and values which underlie the Fourth Amendment. The sanction of exclusion makes meaningful what the court articulates. In this way, we believe that the exclusionary rule both deters unlawful conduct and, perhaps more importantly, fosters a more general respect for constitutional values.

In Point I below, we explain in more detail why we think the exclusionary rule is so important. In Point II below, we argue that a "reasonable mistake" exception is not simply a minor alteration or adjustment. In fact, if adopted, the "reasonable mistake" exception will destroy the salutary purposes of the exclusionary rule and undermine the values of the Fourth Amendment itself.

POINT I

The Exclusionary Rule Protects Significant Constitutional Rights and Values.

A. The Exclusionary Rule Protects the Integrity of the Judicial Process.

The idea that the exclusionary rule protects "judicial integrity" has been repeated so often that perhaps, through repetition, its meaning has been lost. In our view, the exclusionary rule is implicit in the Fourth Amendment itself. Even if it is only a remedial device, it is not one which the Court should adopt or reject simply on the basis of pragmatic calculations. The exclusionary rule is centrally important to our system of constitutional government precisely because, and to the extent that, our courts are important to that system.

In our system of constitutional adjudication, the courts sit as the final arbiters of the lawful limits of governmental authority. The legislature, the police officer, and the magistrate are

each sworn to uphold the Constitution, but the acts of each of them are subject to final review by the courts. That power of final constitutional adjudication of the acts of other branches of government carries with it the obligation to ensure that the courts themselves act always in strict conformity with the Constitution. The courts cannot credibly declare that the action of a police officer violates fundamental constitutional norms, while at the same time making full use of that unconstitutional action in the judicial process.

When a court admits into evidence the fruits of a search, it participates in that search by legitimizing it, not only in the eyes of the searching officer but also in the eyes of the public. For this Court to determine that the exclusionary rule is too costly, that pragmatic considerations compel the courts to accept and legitimize the fruits of unconstitutional searches, would be to demean the role of the courts. The judiciary now stands as the single institution in our governmental structure that declares our constitutional ideals, untainted by convenience, politics, and the passions of the moment. To require the judiciary to calculate cost and convenience would strip it of the moral authority to overrule other branches of government.

As this Court has previously recognized, in criminal cases rulings on evidentiary matters frequently provide the occasion in which the courts either approve or disapprove governmental action.

> Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Terry v. *Ohio*, 392 U.S. 1, 13 (1968).

The exclusionary rule protects this vital function. Without it, the courts would be put in a position of legitimizing conduct which they have found to violate the Constitution. The moral authority of our courts could not for long survive the hypocrisy of declaring governmental conduct so repugnant as to violate the Constitution and at the same time legitimizing that conduct by admitting its fruits into evidence.

It is this hypocrisy which the courts have sought to avoid by creating the exclusionary rule. In the first case establishing the exclusionary rule this Court based the rule on the compelling need to protect the integrity of the judicial process. As this Court stated in *Weeks* v. *United States*, 232 U.S. 383, 392-93 (1914):

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, . . ., should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . .

The exclusionary rule is based on a need to insure that "the courts themselves [not become] accomplices in willful disobedience of law." *McNabb* v. *U.S.*, 318 U.S. 332, 345 (1943). In *Elkins* v. *United States*, 364 U.S. 206 (1960), this Court discussed the exclusion of evidence in terms of the "imperative of judicial integrity" which holds that the federal courts not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold." (364 U.S. at 223). In *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961), where this Court applied the exclusionary rule to the states, the Court continued to stress this principle of judicial integrity:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse,

> its disregard of the charter of its own existence. (footnote omitted).

And, in *Terry* v. *Ohio*, 392 U.S. 1, 12-13 (1968), this Court stated that in addition to the deterrent function:

> The rule also serves another vital function—"the imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222, 4 L.Ed.2d 1669, 1680, 80 S.Ct. 1437, 1447 (1960). Courts which sit under our Constitution cannot and will not be made a party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.

It has become fashionable to denigrate the exclusionary rule by referring to the oft-quoted words of Judge Cardozo that the criminal should not be freed because the constable "blundered." But in the context of constitutional violations, this view, we respectfully urge, misses the point. When the police or other governmental agents violate the Fourth Amendment they do not merely "blunder." However unintentionally, they violate our charter of liberties. The courts cannot be the guardians of these liberties at the same time that they participate in the constitutional violations which endanger these liberties. Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather Than An "Empirical Proposition"?* 16 Creighton Law Review 565, 598-627 (1983).

Moreover, the Court does not write on a clean slate, choosing among alternative interpretations of the Fourth Amendment. If it eliminates or attacks the exclusionary rule, it will be taking a clear step away from existing law. It is unrealistic to suppose that a substantial limitation of the exclusionary rule at this time would be taken as anything other than a signal that the Fourth Amendment has been reduced in importance, and that violations of its commands are now to be countenanced as a necessary cost of effective law enforcement.

We recognize that in recent years the Court has chosen to emphasize other functions of the exlusionary rule. (*See* section

B *infra*.) However, the Court has never repudiated the imperative of judicial integrity as an important reason for excluding evidence obtained in violation of the Fourth Amendment. *See United States* v. *Janis*, 428 U.S. 433, 458 n.35 (1976), and historically this imperative has been the underlying reason for the exclusionary rule. We urge the Court in this case to recognize again this important purpose of the exclusionary rule.

B. The Exclusionary Rule Encourages Lawful Conduct and Discourages Unlawful Action.

Many critics, and even some supporters, of the exclusionary rule have come to focus their attention on the question whether the rule "deters" unlawful governmental conduct. The arguments on both sides appear to be based on extremely simplistic ideas of why governmental agents do or do not attempt to follow the law. Supporters of the rule sometimes say the exclusionary rule "punishes" the police who violate the law by not permitting the fruits of their labors to be used in court. Thus punished, the officer will attempt in the future to conform his behavior to the commands of the courts. Critics counter that the police often have goals different from or in addition to the conviction of a defendant. Excluding evidence will therefore have very little effect on such behavior. Both these arguments seem to assume that law enforcement officials will not obey the law unless they are induced to do so by some coercive means.

These arguments simply ignore the immensely complicated questions of how constitutional values are articulated, translated and reinforced in our society, how governmental officials receive and internalize these values, and how this process affects their behavior. We believe that the exclusionary rule is critically important in this process. The exclusionary rule provides the means by which courts articulate standards for constitutionally permissible conduct and transmit those standards to the public and to the law enforcement community.

As Justice Brandeis has said, "our government is the potent, the omnipresent teacher. For good as for ill, it teaches the whole people by example." *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion). If the courts do not take seriously their own pronouncements that the government acted unconstitutionally, it is less likely that the public or the law enforcement community will respect these pronouncements.

Statements by important law enforcement officials indicate that the exclusionary rule does in fact have the effect of causing the law enforcement community to take more seriously the rules and values of the Fourth Amendment. Former New York City Commissioner Michael Murphy described the response in New York to the application in *Mapp* v. *Ohio* [2] of the exclusionary rule to the states:

> [The police were] immediately caught up in the entire problem of reevaluating our procedures . . . and modifying, amending and creating new policies and new instructions for the implementation of *Mapp*. . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.

Murphy, *Judicial Review of Police Methods in Law Enforcement: the Problem of Compliance by Police Departments,* 44 Texas L. Rev. 939, 941 (1966). Similarly, after California adopted the exclusionary rule, William Parker, then Chief of the Los Angeles Police Department, stated:

> As long as the Exclusionary Rule is the law of California, your police will respect it and operate to the best of their ability within the framework of limitations imposed by that rule.

Kamisar, *Is The Exclusionary Rule An "Illogical" Or the "Unnatural" Interpretation Of The Fourth Amendment?* 62 Judicature 66, 72 (1978), quoting from W. Parker, *Police* 117, 131 (Springfield, Illinois: C.C. Thomas) (Wilson ed. 1957).

---

2 367 U.S. 643 (1961)

As important as training programs and directives from police management may be, the exclusionary rule, we believe, affects law enforcement behavior in a more significant way. The exclusionary rule requires these officials to take seriously the questions raised by the Fourth Amendment. Throughout the country, police officers, prosectutors and other law enforcement officials are forced to discuss questions like: how much evidence do we need before we make this arrest; do we have enough evidence to obtain a warrant in this particular case; can we search this car, or this briefcase, or this desk, or this wallet, or this home? In effect, these public officials are discussing the fundamental values embodied in the Fourth Amendment. How much evidence is needed before governmental officials may invade a citizen's privacy? This dialogue would cease, we believe, without the exclusionary rule, which requires police officers and prosecutors to care about how their conduct will withstand scrutiny in court.

The continuing, nationwide dialogue fostered by the exclusionary rule is the most effective way for our public officials to articulate, to learn about, and to internalize the values of the Fourth Amendment. A former federal prosecutor, and currently Attorney General of the State of Maryland, put the matter nicely as follows:

> When an assistant U.S. attorney, for example, advises an FBI agent that he lacks probable cause to search for bank loot in a parked automobile unless he gets a better make on the car, or that he has a staleness problem with the probable cause to believe that the ski masks used in the robbery are still in the suspect's girlfriend's apartment, or that he should apply for a search warrant from a magistrate and not rely on the consent of the suspect's kid sister to search his home—in all those circumstances, . . . the rule is working.
>
> The principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court. Episodes like these are

> commonplace. It was part of the routine of every Federal prosecutor with whom I have worked. Although my present office has more limited criminal jurisdiction, such police-prosecutor consultation is customary in all of our cases when fourth amendment concerns arise.
>
> I strongly suspect that scenes like these are repeated throughout Federal law enforcement and on homicide, narcotics, and gambling squads in cities throughout the country.

Statement of Stephen H. Sachs, Attorney General, State of Maryland, *Hearings Before the Subcommittee on Criminal Law of the Committee on the Judiciary, United States Senate,* 97th Cong., 1st and 2nd Sess. on S. 101, S. 751 and S. 1995 (1981 & 1982).

The argument has been made that police cannot be deterred from making reasonable mistakes. This overlooks the way in which the exclusionary rule does deter—through educating police in Fourth Amendment law. The more aware police officers are of Fourth Amendment doctrine through good training and educational programs, the more likely it is that the police officer will conform his conduct to the requirements of the law. This was dramatically illustrated by the considerable increase in the number of search warrants issued in the years after the Mapp case. See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Col. L. Rev. 1365, 1395, 1400 (1983).

The deterrent value of the exclusionary rule has also been ably articulated by United States District Judge Herbert Stern—a former United States Attorney:

> I have spent my entire career working within the criminal justice system . . . There is no doubt in my mind that the exclusionary rule does in fact deter law enforcement misconduct at every level. It is simply incredible to sug-

> gest that the police, the FBI, the District Attorney and the United States Attorney are impervious, uncaring or ignorant of the search and seizure rules hammered out in our courts. It is, I think, a slander to suggest that our law enforcement authorities are either so stupid or uncaring that they are unaffected or—if you will—undeterred by what the courts say they must do, and what they must not do.

Letter from Judge Stern to Senator Charles McC. Mathias, dated May 12, 1982, *Hearings Before the Subcomm. on Criminal Law of the Senate Committee on the Judiciary,* 97th Cong., 1st and 2d Sess. on S.101, S.751 and S.1995 at 806-808 (1981 and 1982).

Critics of the exclusionary rule sometimes demean the arguments advanced above by claiming that there is no empirical proof that the rule, in fact, deters unlawful behavior or encourages lawful behavior. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 37 U. Chi. L. Rev. 665 (1970). Other studies suggest that the rule does in fact deter unlawful behavior. *See* Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion,* 62 Ky. L.J. 681 (1974).

Every study is subject to serious methodological criticism and to multiple conflicting interpretations. We may concede, at least for purposes of argument, that no definitive statistical study exists. The point, we think, is that the debate about the effectiveness of the exclusionary rule cannot be resolved by resort to empirical studies.

The arguments about empirical proof raised by critics of the exclusionary rule are reminiscent of arguments about the effectiveness of other sorts of rules in our society—for example, penal laws. We may not be able to prove by empirical study the deterrent effect, of, for example, punishing tax evasion. But we believe that sanctions affect behavior in our society. They do so because they announce appropriate rules of

conduct; they attach serious consequences to a failure to follow those rules; they reinforce those who follow the rules and disapprove of those who do not. Similarly, although we can make no claims about the effect of the exclusionary rule on a particular governmental official, our common sense and experience tell us that, on the whole, the rule affects behavior in such a way as to make lawful conduct more likely and unlawful conduct less likely. *See* Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention,* 23 S. Tex. L.J. 559, 560-72 (1982).

POINT II

To Engraft a "Reasonable Mistake" Exception upon the Exclusionary Rule Would Undercut Both the Functions of the Rule and the Values of the Fourth Amendment Itself.

A. The "Reasonable Good Faith" of the Officer Should Not Immunize from Review the Legality of a Search.

The most important point to be made about a "reasonable mistake" exception is that, by definition, under its regime the courts will be required to use evidence which was obtained in violation of the Constitution. Thus baldly stated, the exception is not simply as a minor adjustment to the exclusionary rule but a major surgery. Engrafting a "reasonable mistake" exception upon the exclusionary rule would not only vitiate the purposes of the exclusionary rule; but it would also undercut the values of the Fourth Amendment itself.

Permitting the use of evidence obtained by "reasonable mistake" in violation of the Constitution effectively turns the unwitting violation by the blundering constable into a wilful violation by the government and the courts. The courts, in the same breath that they declare the unconstitutionality of the seizure, deprive that declaration of any practical effect or meaning by approving such use of the wrongfully-seized evidence. "To sanction such proceedings would be to affirm by

judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Weeks* v. *United States,* 232 U.S. 383, 394 (1914). A "reasonable mistake" exception would involve the courts in a hypocritical exercise, thus materially undermining the integrity of the judicial process.

A "reasonable mistake" exception would also undermine the ways in which the exclusionary rule fosters lawful behavior and discourages unlawful behavior. Proponents of a "reasonable mistake" exception disagree and argue that prohibiting the use of evidence obtained in violation of the Constitution will not deter illegal conduct if the officers reasonably, though mistakenly, believed they were complying with the law.[3] This argument, we respectfully urge, simply misunderstands or ignores the ways in which the exclusionary rule accomplishes its goals.

As we have shown above, the exclusionary rule works in ways both more subtle and more varied than the simplistic model used by proponents of a "reasonable mistake" exception. The "strictness" of the exclusionary rule has caused law enforcement authorities to impose controls on the conduct of searches and seizures, including close supervision over permission to search, recourse to magistrates whenever possible and to prosecutors when not, intense education regarding Fourth Amendment requirements, and more. (*See, e.g.,* statements quoted *supra* at 9-11.) The felt need for such measures would be severely diminished by a "reasonable mistake" exception.

A "reasonable mistake" exception would, we think, entirely destroy the way in which, by inducing daily interchange among courts, prosecutors and police officers, the exclusionary rule fosters discussion about and attempts to comply with the Fourth Amendment. (*See supra* at 9-11.) Prosecutors and police officers preparing for suppression hearings would no

---

3 See, for example, the arguments put forth in the *Final Report of the Attorney General's Task Force on Violent Crime* at 55-56 (1981).

longer be required to focus on the basic issue of whether the governmental conduct was lawful or not. It would become less important to ask whether, for example, the officer had enough information upon which to base an intrusion into some citizen's privacy. The question in the suppression hearing—and therefore in the discussions about and the preparation for such hearings—would be whether the police officer reasonably interpreted the law or not. The more basic question of whether he in fact violated the law would be lost.

Moreover, a "reasonable mistake" exception would make it easier for certain bad-faith police conduct to escape the sanctions of the exclusionary rule. It is never an easy task for a court to declare that the police have blundered, especially when such a conclusion leads to the exclusion of evidence of criminal conduct by an accused. Nor is such a task made easier by the fact that criminal cases are frequently the subject of intense media coverage. Under the exclusionary rule in its present form, a court need only determine whether, as an objective matter, a particular search and seizure complied or failed to comply with Fourth Amendment requirements. Under the "reasonable mistake" exception, however, a court must instead focus, first on the subjective state-of-mind of the officer making the seizure and, secondly, on the comparative reasonableness of that state of mind.[4] Such determinations are enormously difficult.[5] They also put a court in the position of

---

4 Thus, for example, the standard for the "good faith" exception seemingly advocated by Justice White in the dissent in *Stone v. Powell*, 428 U.S. 465 (1976), is met when an officer seizes evidence "in the good-faith belief that his conduct comported with existing law and [there are] reasonable grounds for this belief." *Id.* at 538 (White, J. dissenting). See also Justice White's concurring opinion in *Illinois v. Gates*, 103 S. Ct. 2317, 2336 (1983).

5 *See generally*, Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices In Transition*, 35 Vanderbilt L. Rev. 501, 512 (1982):

> [Under a "reasonable mistake" exception] a court will have to review the policeman's judgment: was the sense of rectitude, how-

having to brand the officer as a miscreant in order to reach the question of whether the evidence should be suppressed. The Committee on Criminal Law of the Association submits that in such situations the pressures on judges to find compliance with the "reasonable mistake" exception would be great and that such findings would be essentially unreviewable.

B. The "Reasonableness" Element of the "Reasonable Mistake" Exception Will Not Produce Meaningful Police Attention to Judicial Review of Fourth Amendment Violations Except Those Involving Obvious and Flagrant Misconduct

There is a gray area in which, under the present rule, police officers resolve doubts in favor of respecting constitutional rights but in which, under the "reasonable mistake" exception, they would resolve doubts against respecting those rights.[6] The

---

ever, sincere, legally sound? Was the officer's decision framed with sufficient awareness and consideration of the principles protecting the subject against the official inspection? Moreover, what are those principles to which the reasonable officer must defer in the exercise of "objectively" approved good faith? . . . If the admissibility of the evidence depends on the police officer's actual or supposed knowledge or understanding of finely wrought constitutional decisions of the courts, then the uncertainty and complexity of today's exclusionary determination has not only been perpetuated into the new era, it has been compounded.

6 The Solicitor General's reliance on the "cost-benefit" analysis is misplaced. In support of his position the Solicitor General cites a group of cases in which the Court declined to apply the exclusionary rule even though a Fourth Amendment violation had occurred. See Brief of the Solicitor General at pages 19, 35 and 42. However, those cases involved only the periphery rather than the core of the criminal case. *See e.g.*, *Alderman* v. *United States*, 394 U.S. 165 (1969) (lack of standing to complain of the search); *United States* v. *Calandra*, 414 U.S. 338 (1974) (use of unconstitutionally obtained evidence in the grand jury); *United States* v. *Janis*, 428 U.S. 433 (1976) (use of evidence in civil tax case); *United States* v. *Havens*, 446 U.S. 620 (1980) (use of evidence for impeachment). The Court has steadfastly refused heretofore to extend the cost-benefit rule to permit introduction on the government's direct case of evidence unlawfully seized

reasoning of the Court in *United States* v. *Johnson*, 102 S. Ct. 2579 (1982), a case which involved the issue of the retroactivity of a ruling that resolved a previously unsettled point of Fourth Amendment law, applies with equal force to determining the consequences of a "reasonable mistake" exception. In *Johnson*, the Court stated:

> "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question." 102 S. Ct. at 2593.

If the proposed "reasonable mistake" exception were adopted, "official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that", so long as a reasonable mistake would justify the admission of evidence obtained by that practice, such evidence would not be excluded. *Ibid.*

Furthermore, in cases in which factual issues are close or the law is unsettled, judges would have little incentive to examine substantive Fourth Amendment issues. The Solicitor General concedes as much in stating:

> "It might well be appropriate for courts to decline to adjudicate nonrecurring fact-bound questions concerning

---

from a defendant's person or premises. The Court has acted wisely in so doing because this basic rule of exclusion commands respect for Fourth Amendment standards by law enforcement agencies, and because receipt of unconstitutionally obtained evidence in such cases would implicate the courts directly in a further encroachment upon constitutional rights.

the propriety of a particular search and seizure if application of a reasonable mistake exception would be sufficient to dispose of the case." (Brief of the Solicitor General, p. 84)

In "nonrecurring fact-bound" cases, which certainly represent the vast majority of Fourth Amendment cases, judges would be unlikely to perceive any purpose in deciding substantive Fourth Amendment issues under a "reasonable mistake" rule, because of the overwhelming likelihood that such decisions would not be outcome-determinative. In close cases a "reasonable mistake" test would inevitably result in receipt of the evidence for use at trial. Hence there would be a large penumbra of cases in which constitutional rights were violated but in which no meaningful judicial review, even at the trial court level, would take place. The "reasonable mistake" exception would result in the admissibility of evidence derived from almost all illegal searches and seizures.

C. The Mere Issuance of a Warrant Should Not Immunize from Review the Legality of a Search.

This brings us to another shortcoming of a "reasonable mistake" exception—one particularly relevant to two of the cases before this Court. Most proposals for a "reasonable mistake" exception focus entirely on the reasonable good faith of the officer, and not at all on the reasonable good faith of the magistrate who issues a warrant. Thus, except in extraordinary circumstances (such as when an officer provides a magistrate with a perjurious affidavit), any time a police officer seeks and obtains a warrant before conducting a search, he will thereby establish his reasonable good faith in conducting the search. All such searches conducted pursuant to a warrant will be immune from suppression, regardless of whether the magistrate wrongly issued the warrant. Indeed, in such a situation, the victim of an unconstitutional search will not even have a motive to challenge the search because the mere reasonable faith of the police in seeking the warrant will bar suppression of the fruits of the search regardless of the validity *vel non* of

the warrant. Thus, regardless of the validity of the warrant, review of the underlying search is effectively precluded.

This result will have many deleterious consequences. Under the exclusionary rule as it now exists, police officers and prosecutors have an incentive to consider carefully their basis for seeking a search warrant. Under a reasonable mistake exception, the incentive is removed. The mere application will virtually insure that the evidence obtained will be admitted in court. Under such a regime it will be sufficient for the police officers and prosecutors merely to seek out the magistrate most inclined to grant a warrant, since even if he errs, the fruits of the search will be immune from suppression.[7] Magistrates vary widely, both within districts and throughout the country, in their training, experience and attention to Fourth Amendment values. Moreover, a magistrate in doubt as to whether or not to issue a warrant will have a strong motive to err on the side of issuance, since the results of the search will remain unaffected even if the warrant is later held invalid. For these reasons, among others, the Second Circuit has rejected a "reasonable mistake" exception similar to the one discussed here. *United States* v. *Karathanos,* 531 F.2d 26, 33-34 (2d Cir.), *cert. denied,* 428 U.S. 910 (1976).

The most serious consequence, however, is that such an exception will undercut one of the important purposes of the Fourth Amendment. If the mere fact that a police officer seeks and obtains a warrant proves his reasonable good faith, and if that reasonable good faith is sufficient to defeat a claim of suppression, then, in effect, the magistrate issuing the warrant will have unreviewable discretion. His warrants would be, in practical effect, irreversible. "Unreviewable and irreversible errors of this magnitude offend justice." Uviller, *The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition, supra,* at 517.

---

7 *See* Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law,* 70 Georgetown L.J. 365, 404 (1981).

This result turns the Fourth Amendment on its head. The office of the Fourth Amendment was not to insure that officers obtain warrants. Warrants, in themselves, were not perceived by the founding fathers (or their predecessors in England) to be valuable protections. To the contrary, the warrant was often viewed as an evil to be avoided.[8] Indeed, the prime evil which prompted the Fourth Amendment was the so-called "writ of assistance," which was a general warrant issued at the unreviewable discretion of a magistrate.[9]

The general warrant permitted serious intrusions at the same time that it insulated the executing officers from civil liability. That is why the Fourth Amendment was not meant to be a monument to the virtue of warrants. It is, and was meant to be, a limitation on the ability of state officials to obtain warrants.[10] Under our Constitution, police officers are told that they cannot obtain and execute warrants, and magistrates are told that they cannot issue them, unless they are based upon "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See also Boyd* v. *United States*, 116 U.S. 616, 630 (1885). Thus, a "reasonable mistake" exception which makes a warrant presumptive evidence of admissibility would effectively rewrite the history, and undercut the purpose, of the Fourth Amendment itself by returning to magistrates the unreviewable discretion which the Fourth Amendment was meant to remove.

---

8 *See* M. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* at 26 (1937); T. Taylor, *Two Studies in Constitutional Interpretation* at 38-44 (1968); Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, *supra*, at 571-579; *Wilkes* v. *Wood*, 19 Howell's State Trials 1153 (1763); *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765).

9 *See* T.M. Cooley, *The Treatise on Constitutional Limitations* at 368-9 (1927); 3 *Elliot's Debates on the Federal Constitution* at 448-49 (1836); 1 LaFave, *Search and Seizure: A Treatise On the Fourth Amendment* § 1.1 (1978).

10 *See* Mertens & Wasserstrom, *supra*, at 374, n.43

D. The Exclusionary Rule is Required by the Fourth Amendment Because it is the Only Remedy for Fourth Amendment Violations

In pressing for the "reasonable mistake" exception, the Solicitor General rests his argument in part upon the proposition that many Fourth Amendment issues can be resolved in other settings, such as actions for declaratory or injunctive relief or damage actions brought against municipalities under 42 U.S.C. Sec. 1983. (Brief of the Solicitor General at 26, 86). Those remedies are certainly illusory for the victims of almost all Fourth Amendment violations. Declaratory or injunctive relief would be available only in the rare case where the potential victim has knowledge that an unconstitutional search is about to take place. Actions against municipalities would require proof that an unlawful search and seizure was the result of official government policy rather than the unauthorized action of an individual police officer. See Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, *supra*, at 1386-87. Damage actions against individual state or local officials can be defeated by a defense of "good faith" and thus are of no avail to victims whose right to object to admission of the evidence at trial has been eliminated by the "reasonable mistake" exception. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2737 (1982). Thus, none of the purported civil remedies provide any meaningful substitute for the exclusionary rule. We submit that former Justice Stewart is correct in arguing that the exclusionary rule is a constitutionally mandated remedy, necessary to enforce the fourth and fourteenth amendments. Stewart, *op. cit.*, at 1387-88, 1404.

E. Occasional Erroneous Suppression Rulings Provide No Reason to Adopt a "Reasonable Mistake" Exception to the Exclusionary Rule.

Some proponents of the "good faith" exception suggest that it is not a major departure from present law. For example, the Solicitor General argues that it would merely require the court to determine "whether a reasonably well-trained officer should

have known, in light of the extant principles of law, that his conduct was prohibited. The inquiry thus will not be markedly different from that required of a court in deciding a suppression motion." (Brief of the Solicitor General at 25.)

If that formulation is meant to limit inquiry to the reasonableness of belief of the officer, and to exclude inquiry into the reasonableness of the magistrate who issued the warrant, then it is wrong for the reasons set forth above. If, on the other hand, the "good faith" exception is meant to focus on the objective reasonableness of police officers and magistrates and other officials rather than arcane technicalities, then the Solicitor General's argument is misdirected. Much of the impetus for a good faith exception seems to come from judicial decisions excluding evidence that resulted from eminently reasonable police conduct. *See, e.g.*, Brief of the Solicitor General at 51, n.16 and 52, n.17. We agree that in the corpus of Fourth Amendment jurisprudence there may be many examples of erroneous decisions, in which courts have held unconstitutional the reasonable acts of police officers, magistrates, and other governmental officials. It is tempting to urge that these erroneous rulings be deprived of effect by limiting the exclusionary rule. But the proper response to that problem is not the hypocrisy of retaining the rulings and stripping them of their consequences. Instead, the underlying rulings should be brought into conformity with standards of reasonableness. It should be a logical impossibility for a search to be both unreasonable enough to be unconstitutional and reasonable enough to qualify for a "reasonable mistake" exception. A reasonable search should satisfy the Constitution.

The occasional errors made by courts in ruling on suppression motions should not be permitted to divert our attention from the important values of the Fourth Amendment. When there is a genuine violation of the Fourth Amendment, the courts should not permit the evidence to be used. Excluding unlawfully obtained evidence encourages lawful activity, discourages unlawful activity, and reinforces the central role of courts in declaring and enforcing constitutional principles.

Engrafting a "reasonable mistake" exception upon the exclusionary rule would trivialize not only the rule itself but also the Fourth Amendment rules it seeks to protect.

Conclusion

Therefore, we respectfully urge the Court not to modify the exclusionary rule, and, more particularly, not to adopt a "reasonable mistake" exception to the exclusionary rule.[11]

Respectfully submitted,

PETER L. ZIMROTH
Attorney for Amicus Curiae
80 Pine Street
New York, New York 10005
(212) 422-4030

Of Counsel:

JOHN H. DOYLE, III
666 Third Avenue
New York, New York 10017

JED S. RAKOFF
20 Broad Street
New York, New York 10005

RICHARD D. WEINBERG
919 Third Avenue
New York, New York 10022

BARBARA D. UNDERWOOD
210 Joralemon Street
Brooklyn, New York 11201

---

11 This brief represents the views of a substantial majority of the Committee. Further, because of their public positions, some members of the Committee did not participate in the decision to submit this brief.

(THIS PAGE INTENTIONALLY LEFT BLANK)

FILED
SEP 12 19
ALEXANDER L. STE
CLERK

NO. 82-963

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

COMMONWEALTH OF MASSACHUSETTS

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

BRIEF OF AMICI CURIAE STATE OF FLORIDA, ET AL.

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, FL 32301
(904) 488-0290

QUESTION PRESENTED

Whether the Fourth Amendment to the United States Constitution requires inflexible application of the Exclusionary Rule when a police officer has reasonably and in good faith relied upon a search warrant to seize items specified in his application for the warrant, but the warrant is subsequently invalidated for judicial error in failing to specify the items in the warrant itself?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iii
INTEREST OF AMICI CURIAE	4
SUMMARY OF THE ARGUMENT	6
ARGUMENT	
THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.	8
CONCLUSION	62

TABLE OF CITATIONS

Cases	Page
Aguilar v. Texas, 378 U.S. 108 (1964);	49, 60
Beck v. Washington, 369 U.S. 541 (1962)	52
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)	36
Bonner v. Prichard, 551 F.2d 1206 (11th Cir. 1981)(en banc)	33
Brown v. Illinois, 422 U.S. 590 (1975)	12, 45
Commonwealth v. Sheppard, 441 N.E.2d 725 (Mass. 1982)	12, 41, 54
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	44, 45, 58, 60
Desist v. United States, 394 U.S. 244 (1969)	27
Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982)	39
Drumheller v. Commonwealth, 291 S.E.2d 602 (Va. 1982)	39
Engle v. Isaac, 456 U.S. 107 (1982)	54
Florida v. Brady, Case No. 81-1636	19

Florida v. Casal, ___ U.S. ___, 77 L.Ed.2d 277 (1983) 19

Florida v. Royer, ___ U.S. ___, 75 L.Ed.2d 229 (1983) 19

Franks v. Delaware, 438 U.S. 154 (1978). 43

Gerstein v. Pugh, 420 U.S. 103 (1975) 45, 58

Gifford v. State, 630 S.W.2d 387 (Tex. Crim. App. 1982) 38

Giordenello v. United States, 357 U.S. 480 (1958) 49

Gregg v. Georgia, 428 U.S. 153, 186 (1976) 17

Harris v. New York, 401 U.S. 222 (1971) 30

Holloman v. Commonwealth, 275 S.E.2d 620 (Va. 1981) 38

Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527 (1983) 10, 11, 12, 19, 42, 43, 45, 46, 47, 48, 49, 50, 51, 58, 59, 60

Jackson v. Virginia, 443 U.S. 307 (1979) 53

Johnson v. United States, 333 U.S. 10 (1948) 43, 60

Katz v. United States, 389 U.S. 347 (1967) 27

Linkletter v. Walker, 381 U.S. 618 (1965) 26, 27

Mapp v. Ohio, 367 U.S. 643 (1961) 4, 26, 35, 43

Michigan v. DeFillippo, 443 U.S. 31 (1979) 24, 39, 41, 57, 59

Michigan v. Tucker, 417 U.S. 433 (1974) 26

Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100 (1920) 52

Nathanson v. United States, 290 U.S. 41 (1933) 49

Oregon v. Haas, 420 U.S. 714 (1975) 30

Payton v. New York, 445 U.S. 573 (1980) 47

People v. Defore, 242 N.Y. 13, 150 N.E. 585 (N.Y. 1926) 11

Rakas v. Illinois, 439 U.S. 128 (1978) 29

Robberson Steel Co. v. Occupational Safety and Health Review Comm., 645 F.2d 22 (10th Cir. 1980) 39

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 8

Shadwick v. City of Tampa, 407 U.S. 345 (1972) 58

Smith v. Hoath, 691 F.2d 220 (6th Cir. 1982) 37

Spinelli v. United States, 393 U.S. 410 (1969) 49, 60

State v. Harbaugh, 326 A.2d 821 (Vt. 1974) 39

State v. Lehnen, 403 So.2d 683 (La. 1981) 38, 55

Stone v. Powell, 428 U.S. 465 (1976) 10, 11, 16, 53

United States v. Caceres, 440 U.S. 741 (1979) 32

United States v. Calandra, 414 U.S. 338 (1974) 32

United States v. Ceccolini, 435 U.S. 268 (1978) 30

United States v. Frady, 456 U.S. 152 (1982) 53

United States v. Havens, 446 U.S. 620 (1980) 30

United States v. Hill, 500 F.2d 315 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975) 61

United States v. Janis, 428 U.S. 433 (1976) 31

United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982) 28

United States v. Lefkowitz, 285 U.S. 452 (1932) 44

United States v. Mahoney, ___ F.2d ___, Case No. 82-1452 (5th Cir., opinion filed Aug. 22, 1983) 34, 51

United States v. Payner, 447 U.S. 727 (1980) 12, 29

United States v. Peltier, 422 U.S. 531 (1975) 25, 28

United States v. Ross, 456 U.S. 798 (1982) 49, 59

United States v. Ventresca, 380 U.S. 102 (1965) 46, 47, 60

United States v. Williams, 622 F.2d 839 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981) 33, 38, 39, 41, 58

Walder v. United States, 347 U.S. 62 (1954) 31

Weeks v. United States, 232 U.S. 383 (1914) 35

Statutes

18 U.S.C. §223(2)(a) 14

42 U.S.C. §1983 37

Ariz. Rev. Stat. Ann. §13-3925 5, 40

Colo. Rev. Stat. §16-3-308 5, 40

Utah Code Ann. §§78-16-1 through 11 (Interim Supp. 1982) 5, 37, 40

Constitutions

Cal. Const. Art. I, §28(d) 40

Fla. Const. of 1968, Art. I, §12 (1982) 4

Fourth Amendment, U. S. Const. 4, 59

Other

National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 10 (1982) 17

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970) 14

J. Fennelly, Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason (The Prosecutor, Journal of the National District Attorney's Assoc., Vol. 17, No. 2, Winter 1983, p. 32) 57

Florida Judicial System Statistical and Program Activity Report, 1980 and 1981, at A-1 and B-1 (1982) 18

Congressional Record s.1764, 98th Cong., 1st Sess. 129 Cong. Rec. 11679 (Aug. 4, 1983) 14

NO. 82-963

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

COMMONWEALTH OF MASSACHUSETTS

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

This brief is submitted by the State of Florida and the following states in support of the State of Massachusetts:

Arizona	Attorney General Robert K. Corbin
California	Attorney General John K. Van de Kamp
Colorado	Attorney General Duane Woodard
Connecticut	Chief State's Attorney Austin J. McGuigan

Delaware	Attorney General Charles M. Oberly, III
Georgia	Attorney General Michael J. Bowers
Hawaii	Attorney General Tany S. Hong
Idaho	Attorney General Jim Jones
Indiana	Attorney General Linley E. Pearson
Kansas	Attorney General Robert T. Stephan
Louisiana	Attorney General William J. Guste, Jr.
Michigan	Attorney General Frank J. Kelley
Minnestoa	Attorney General Hubert H. Humphrey, III
Mississippi	Attorney General Bill Allain
Montana	Attorney General Michael T. Greely
Nevada	Attorney General Brian McKay
New Hampshire	Attorney General Gregory H. Smith
New Jersey	Attorney General Irwin I. Kimmelman

North Carolina	Attorney General Rufus L. Edmisten
North Dakota	Attorney General Robert O. Wefald
Ohio	Attorney General Anthony J. Celebrezze, Jr.
Oklahoma	Attorney General Michael C. Turpen
Pennsylvania	Attorney General LeRoy S. Zimmerman
Rhode Island	Attorney General Dennis J. Roberts, II
South Carolina	Attorney General T. Travis Medlock
Utah	Attorney General David L. Wilkinson
Vermont	Attorney General John J. Easton, Jr.
Virginia	Attorney General Gerald L. Baliles
Washington	Attorney General Ken Eikenberry
West Virginia	Attorney General Chauncey H. Browning, Jr.
Wisconsin	Attorney General Bronson C. LaFollette
Wyoming	Attorney General A. G. McClintock

INTEREST OF AMICI CURIAE

The above-listed states, through their attorneys general, respectfully offer this brief in support of the State of Massachusetts. The amici will all be bound by the decision since this case involves the Fourth Amendment to the United States Constitution, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). Many of the amici have state constitutions which have been construed in the search and seizure context to be identical to the Fourth Amendment to the United States Constitution. Indeed, Florida's constitutional prohibition against unreasonable searches and seizures expressly states that:

> This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.

Fla. Const. of 1968, Art. I, §12 (1982).

Additionally, three of the amici have legislatively provided a good faith exception to the exclusionary rule. See Utah Code Ann. §§78-16-1 through 11 (Interim Supp. 1982); Ariz. Rev. Stat. Ann. §13-3925; Colo. Rev. Stat. §16-3-308. Obviously, the ruling in this case will affect these amici, as well as those states contemplating similar legislation.

Furthermore, the state attorneys general in assembly have gone on record by formal resolution that they support legislation which would provide that "evidence obtained in the course of a reasonable good faith search should not be excluded from criminal trials." This resolution is included in the Appendix to the brief.

SUMMARY OF THE ARGUMENT

As the exclusionary rule is now rigidly applied, it no longer serves to deter police misconduct or foster the integrity of the judicial system. Instead, imposition of the rule in an overwhelming number of cases benefits those who violate the law, without regard to how exclusion obscures society's goal of obtaining the truth at trial. Amici submit that the Court should modify the rule to make its application more sensitive to the costs and benefits of its imposition.

Because it is impossible to deter police officers from doing acts which they do not know, or could not reasonably know are illegal, evidence should not be excluded when police officers act with both a reasonable and good faith belief that their conduct is lawful.

However, in all cases in which a neutral and detached magistrate has issued a search warrant which commands or authorizes that law enforcement officers conduct a search, evidence should not be excluded because there is no way that the purpose of the rule can be served. The judiciary has actively encouraged law enforcement officers to obtain warrants, and it is not prudent to punish society's effort to obtain justice, thus benefiting only those with something to hide, because a judicial officer has improperly or incorrectly issued a search warrant. Therefore, unless the warrant was obtained by fraud or was improperly executed, evidence should never be excluded once a neutral and detached magistrate has issued a search warrant.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED WHEN THE EXCLUSION OF EVIDENCE WOULD FAIL TO SERVE THE RULE'S PURPOSE OF DETERRING POLICE OFFICERS FROM MISCONDUCT.

The exclusionary rule is a judicially created procedural safeguard applied to the benefit of criminal defendants. In recent years, some of the current members of the Court, as well as hundreds of other judges throughout the country, have questioned the continued viability of the rule in light of how the rule has been followed without regard to the question of guilt or innocence or more importantly without regard to the original purpose of the rule. Schneckloth v. Bustamonte, 412 U.S. 218, 267, n.24 (1973)(Powell, J., concurring). The time has come when the Court can no longer ignore the encouragement that blind adherence to the exclusionary rule affords the ever expanding criminal component of

our society. The rule should be modified, and the time is now.

A.

THE EXCLUSIONARY RULE SHOULD BE MODIFIED BECAUSE ITS PRESENT SWEEPING APPLICATION, WITHOUT REGARD TO THE EXTENT OR MAGNITUDE OF A FOURTH AMENDMENT VIOLATION, FRUSTRATES THE RULE'S PURPOSE.

It is now well settled that the primary purpose of the exclusionary rule is to deter police conduct which violates the Fourth Amendment. Stone v. Powell, 428 U.S. 465, 486 (1976). However, it is equally well settled from the enormous amount of controversy about the manner in which the rule has been applied that it "not only sets the criminal free but also fails to serve any constitutional interest in securing compliance with the important requirements of the Fourth Amendment." Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 554 (1983)(White, J., concurring). Significant questions about the continued vitality of the rule have recognized the

need for reform. Illinois v. Gates, supra, 76 L.Ed.2d 539 [citations omitted].

The amici curiae submit that as the rule is now rigidly applied by state and intermediate federal courts, it serves almost exclusively to punish society's law-abiding citizens while benefiting criminals whom the rule was never intended to serve. Why should criminals go free because "the constable has blundered"? People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (N.Y. 1926)(Cardozo, J.).

It should be beyond peradventure that justice should be a truth seeking process --however, as the rule is now inflexibly applied, it fosters disrespect rather than enhancing the integrity of the judicial system which originally was a second reason for the rule. Stone v. Powell, supra at 428 U.S. 484. Illinois v. Gates, supra, at 76 L.Ed.2d 561 (White, J., concurring).

Thus, the rule is now causing precisely the same disrespect for the judicial process which it sought to eliminate! Cf. United States v. Payner, 447 U.S. 727, 736 (1980); Commonwealth v. Sheppard, 441 N.E.2d 725, 732, n.14 (Mass. 1982).

As the rule is now applied, it makes no distinction among the "significant practical differences" of various fourth amendment violations. Brown v. Illinois, 422 U.S. 590, 609 (1975)(Powell, J., concurring in part). Instead, once it is determined after the fact that the Fourth Amendment has been abridged, evidence is excluded without regard to the culpability of the officer who seized it. How can an officer be deterred from doing something he does not know is wrong? This defies common sense. Illinois v. Gates, supra, 76 L.Ed.2d 562 (White, J., concurring).

Moreover, because police officers are insulated from the actual exclusion decision (e.g., sequestered at the suppression hearing or removed by time and distance from an appellate exclusion of evidence), the purpose of police deterrence is defeated because officers may never learn how or why the evidence was excluded. Instead, law enforcement officers are likely to blame the judiciary, the prosecutor, or "the system," thus obliterating any chance of inspiring confidence in the judicial system, which was the second reason for the rule.

The frailty of the rule as it now exists can perhaps best be evidenced by the fact that no other jurisdiction has adopted it. Ours is the only jurisdiction which tolerates a situation in which if there has been one wrong, the defendant's, the punishment will be swift, but where there

have been two wrongs, the defendant's and an officer's, both will escape punishment. See Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 755 (1970). Legislation to amend the judicially created exclusionary rule has recently been reported out of the Committee on the Judiciary. During his remarks, Senator Thurmond noted that the present Administration was instrumental in formulating the new legislation.[1]

---

[1] Congressional Record, s.1764, 98th Cong., 1st Sess., 129 Cong. Rec. 11679 (Aug. 4, 1983). The Bill amends 18 U.S.C. §223(2)(a) and is entitled "Limitation of the fourth amendment exclusionary rule" and reads as follows:

> Except as specifically provided by statute, evidence which is obtained as a result of a search or seizure and which is otherwise admissible shall not be excluded in a proceeding in a court of the United States if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the

A final reason that the exclusionary rule no longer serves its original purpose is that it discourages law enforcement officers from relying upon or following up citizen participation in crime prevention and detection. In recent years, literally hundreds of crime-watch programs and other crime reporting methods relying upon citizen initiative have sprung up across the country. A blanket application of the rule, as the Supreme Judicial Court of Massachusetts felt compelled by law to apply in this case, serves absolutely no useful purpose and instead enhances public distrust and disgust with a judicial rule

---

Constitution of the United States. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a reasonable good faith belief, unless the warrant was obtained through intentional and material misrepresentation.

which rewards murderers for technical errors of judgment made by judges and law enforcement officers in the heat of a homicide investigation. Unquestionably, as the rule is inflexibly applied now, in such cases only society and justice, not the criminal, are punished. While the amici might not question rules of law which would permit 100 guilty to go free to prevent an innocent person from being convicted, that is not the situation where the exclusionary rule is involved because the violation does not involve the integrity of the truth finding process. Stone v. Powell, supra. A defendant who is attempting to use the rule is unquestionably seeking to obscure the truth.

B.

THE EXCLUSIONARY RULE HAS A SIGNIFICANT DELETERIOUS EFFECT ON PROSECUTIONS INVOLVING THE FOURTH AMENDMENT.

The State of Florida and the amici strongly disagree with those who argue that there is no problem with the exclusionary rule as currently applied and that evidence is excluded in only a handful of cases.[2] A recent study by the National Institute of Justice reveals that in California 4.8% of cases rejected for prosecution between 1976-1979 were rejected for search and seizure problems. National Institute of Justice, The Effects of the Exclusionary Rule: A Study in California 10 (1982). Of

---

[2]Amici recognize that statistics are often not dispositive because they can be viewed in a myriad of ways. See, Gregg v. Georgia, 428 U.S. 153, 186 (1976). However, these statistics are offered in Respondent's case to demonstrate that the controversy surrouding the exclusionary rule is both real and significant.

those 4.8%, 71.5% were drug offenses. Id. at 12. Also, the authors of the report indicated that the data analyzed for the study tended "to understate the net effect of the exclusionary rule." Id. at 9.

The significance of these percentages becomes strikingly apparent when applied to other states. For example, in Florida, in 1980 and 1981, 89,451 out of a total of 274,899 cases filed were dismissed prior to trial.[3] Applying California's conservative 4.8% figure to Florida's dismissals reveals that 4,293 cases might not have been prosecuted during those two years because

---

[3]Florida Judicial System Statistical and Program Activity Report, 1980 and 1981, at A-1 and B-1 (1982). Dismissals prior to trial are not categorized by reason for the dismissal, thus exact figures are unavailable for search and seizure problems. Also, no figures are available for cases which were never referred for prosecution because law enforcement officers were aware of search problems.

of search and seizure problems. It is also significant to note that during the same period, 36% of the drug cases which were filed were dismissed prior to trial. Presumably, a large number of dismissals were for search and seizure problems.

Should there be any doubt about the significance of the problem, the Court has only to note that three of the cases which this Court deemed significant enough to grant certiorari during its last term came from Florida and involved the exclusionary rule. See Florida v. Royer, ___ U.S. ___, 75 L.Ed.2d 229 (1983)(drug courier profile); Florida v. Casal, ___ U.S. ___, 77 L.Ed.2d 277 (1983)(warrantless safety inspection of vessel); Florida v. Brady, Case No. 81-1636 (open fields). Regardless of how the figures are viewed, the problem is significant and requires the Court's immediate attention. See Illinois v. Gates, supra, at 76 L.Ed.2d 539.

The severity of the drug problem in the United States, and particularly in Florida, is evidenced by the recent publicity and fiscal and military support given to south Florida by the current Administration. However, all the money in the world cannot solve the drug problem if the cases are never brought to trial because of the exclusionary rule.

Finally, while most of the available data addresses dismissals prior to trial, the Court should not overlook that application of the rule by appellate judges is a major obstacle to the truth seeking process. Suppression ordered by appellate judges is even more egregious because the evidence has already been deemed admissible by a trial court--again, how is the goal of police officer deterrence fostered when even the judges cannot agree on the law? In Florida alone, at least 48 officially

reported cases were reversed on appeal between 1980 and 1982 for search and seizure problems.[4] Of course, no data is available on the number of cases which were not appealed by the State because of the 48 published opinions which established adverse law.

No matter how the above data is categorized and analyzed, one factor is inescapable--the exclusionary rule affects a significant number of cases, and consequently a large number of guilty defendants have escaped prosecution because of it. Law enforcement officers are frustrated and society is outraged by technical, often nonsensical, even apologetic appellate rulings which allow convicted murders like

---

[4]This information was obtained from a computer search and does not reflect the number of appeals sought but lost by the State.

Respondent opportunities to escape justice. The exclusionary rule was not designed for such purposes, and the Court should take this opportunity to cause the rule to be applied only in those limited situations in which police officer deterrence will be fostered.

C.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN IT WAS SEIZED BY A POLICE OFFICER WHO HAD A GOOD FAITH BELIEF SUPPORTED BY OBJECTIVE REASONABLE GROUNDS THAT HIS CONDUCT WAS LAWFUL.

While there has been widespread agreement among law enforcement officers, prosecutors, judges, and even some of the defense bar that there are problems with the application and enforcement of the exclusionary rule, the question remains what should be done to the rule itself or the manner in which it is applied. The amici curiae are not urging the Court to take the drastic step of abolishing the exclusionary rule altogether, but rather, the various states are asking the Court to modify the rule in a common sense fashion which would still accomplish the rule's original objectives.

The Court should adopt an approach which eliminates the "all or nothing"

rationale of the rule as it is now being applied. The amici submit that a better alternative would be a rule which would not order exclusion when the evidence was seized by a law enforcement officer acting in good faith with a reasonable belief supported by objective reasonable grounds that his conduct was lawful.

The Court has already adopted this type of approach in many varied situations involving evidence seized or obtained from improper searches and seizures. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court upheld the admission of evidence which had been seized after an arrest which was later termed illegal only after the ordinance authorizing the arrest had been found unconstitutional. The Court recognized that "[a] prudent officer, in the course of determining whether respondent had committed an offense under all the

circumstances shown by this record, should not have been required to anticipate that a court would later hold the ordinance unconstitutional." Id. at 443 U.S. 37, 38. The Court noted that it was a police officer's duty to enforce laws until those laws are found unconstitutional, and the Court commented that society would suffer if police officers took it upon themselves to determine which laws were constitutionally entitled to enforcement. Id. at 443 U.S. 38.

In United States v. Peltier, 422 U.S. 531 (1975), a majority of the Court refused to apply the exclusionary rule to a border search when the statutory and regulatory authority for the search were found unconstitutional in a case that was decided long after the search had been conducted. The Court specifically recognized that exclusion of evidence was not required when

it would not serve the purpose of the rule because there had been absolutely no way for the law enforcement officers to know that their search was unconstitutional. Id. at 422 U.S. at 542.

Similarly, in Michigan v. Tucker, 417 U.S. 433, 447 (1974), a majority of the Court recognized that where police officers had acted "in complete good faith" the rule's deterrence rationale was not compelling enough to cause the exclusion of evidence even though the evidence had been indirectly obtained in violation of the Constitution because the defendant had not been Mirandized.

The Court has previously applied this same rationale in its retroactivity cases. In Linkletter v. Walker, 381 U.S. 618, 637 (1965), the Court refused to make retroactive Mapp v. Ohio, 367 U.S. 643 (1961), which, of course, was the case which held

that the exclusionary rule was applicable to the states in the first place. In Linkletter, the Court explicitly recognized that the application of the exclusionary rule retroactively "by the wholesale release of the guilty victims" [criminals] would not serve the rule's purpose of police officer deterrence. Id. at 381 U.S. 637. In other words, the Court implicitly recognized that police officers would not be deterred by the application of the rule at that late date because when their alleged "illegal conduct" had occurred, that conduct had not yet been judicially declared to be illegal. The rule was not applied retroactively because the reason for the rule would not have been served. See also Desist v. United States, 394 U.S. 244 (1969), in which the Court refused to apply retroactively Katz v. United States, 389 U.S. 347 (1967), which had expanded the

limits of fourth amendment protection in terms of reasonable expectation of privacy.

This logic is unaffected by the Court's more recent case of United States v. Johnson, ___ U.S. ___, 73 L.Ed.2d 202 (1982). That case is consistent with the rationale supporting a good faith exception because in Johnson, law enforcement officers should have been on notice for at least one month that a warrantless arrest in a home was illegal in that jurisdiction. Id. at 73 L.Ed.2d 216, n.15. Thus, a law enforcement officer who made a warrantless arrest could not have had both a good faith and reasonable belief that his conduct was lawful, and consequently, a good faith exception could not be justified under those circumstances. Had that not been the case, this Court might well have reached a contrary conclusion. See United States v. Peltier, supra.

Moreover, the same practice of not applying the harsh sanctions of the rule in situations where the purpose of deterring police officer illegal conduct would not be served can be found in the Court's standing cases. For example, in Rakas v. Illinois, 439 U.S. 128, 134 (1978), the Court refused to apply the exclusionary rule to the benefit of defendants whose fourth amendment rights had not been violated. See also United States v. Payner, 447 U.S. 727, 735 (1980), in which the majority of the Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before the Court. The Court emphasized that the interests of deterring illegal searches were not served by the exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." Id.

In United States v. Ceccolini, 435 U.S. 268 (1978), the Court declined to exclude live testimony which had been derived from an unconstitutional search--the Court stated that exclusion would have no relation to the rule's deterrence rationale. Id. at 435 U.S. 279.

In a similar vein, the Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In United States v. Havens, 446 U.S. 620, 628 (1980), the Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and the Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. See also Oregon v. Haas, 420 U.S. 714 (1975); Harris v. New York, 401 U.S.

222 (1971); and Walder v. United States, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in federal civil proceedings even though the evidence was seized in violation of the Constitution. In United States v. Janis, 428 U.S. 433, 455 (1976), Justice Blackmun wrote that there was no justification for extending the exclusionary rule to a federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

In accord, United States v. Caceres, 440 U.S. 741 (1979)(evidence obtained in violation of Internal Revenue Service regulations admissible in criminal trial when agency action reflected a good faith attempt to comply with the law).

Similarly, the rule has not been applied to grand jury proceedings. United States v. Calandra, 414 U.S. 338 (1974). The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. Id. at 414 U.S. 351, 352.

Thus, it is clear that the Court has already recognized the problems with the rule and the wisdom of not applying the rule in situations in which alleged police misconduct would not be deterred or the truth finding process would be impeded. However, the Court has not yet taken that

last step and ruled that evidence should not be suppressed when it was seized by a police officer who was acting in a reasonable good faith belief, supported by articulable objective grounds, that the search and seizure was lawful. This case presents such an opportunity.

The Fifth Circuit Court of Appeals, sitting en banc, has already adopted the same good faith standard which the amici curiae submit should be made law nationwide. United States v. Williams, 622 F.2d 839, 847 (5th Cir. 1980), cert. denied, 449 U.S. 1127 (1981). The good faith exception to the exclusionary rule is also the law in the Eleventh Circuit. Bonner v. Prichard, 551 F.2d 1206 (11th Cir. 1981)(en banc).

In Williams, the Fifth Circuit emphasized that it had modified the rule "only to conform that [the rule] to its underlying purpose: to deter unreasonable

or bad-faith police conduct." Id. at 622 F.2d 847. The court also explained that the good faith exception would apply only if the officer's belief was both "bona fide and reasonable." Id. at 622 F.2d 843 (emphasis added). This principle was recently reaffirmed in United States v. Mahoney, ___ F.2d ___, Case No. 82-1452 (5th Cir., opinion filed Aug. 22, 1983). Therefore, suppression would still result in cases in which the proponent of the evidence could not establish that the officer's belief was both in good faith and reasonable in light of the circumstances known to the officer at the time. In other words, the original purpose of the rule would still be served by exclusion of evidence in cases involving bad faith or unreasonable conduct on the part of law enforcement officers.

The adoption of the good faith exception to the exclusionary rule by this Court would not be a decision which would strip defendants of their constitutional rights. While protection against unreasonable searches and seizures may have its roots in the common law and, of course, the Constitution, the exclusion of evidence thus obtained is uniquely a product of the judicial system of the United States. Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, supra.

Moreover, practice in both the Fifth and Eleventh Circuits has conclusively demonstrated that the anguished outcries found in the rhetoric of those opposed to modifying the rule are unfounded. In fact, on March 16, 1982, the Senate Judiciary Subcommittee on Criminal Law heard testimony on whether Congress should statutorily create a good faith exception

to the exclusionary rule. Testimony before that Subcommittee established that there had been no abuses of the good faith exception to the exclusionary rule in either the Fifth or Eleventh Circuits as of that date.[5]

As Chief Justice Burger explained in his dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 419, 422 (1971), a civil remedy against the offending officer would be more viable than the "universal 'capital punishment'" inflicted upon all illegally obtained evidence, regardless of how it was obtained. Amici submit that police officer deterrence would be more

---

[5]The Committee heard testimony that there had been 1,185 criminal filings in the Southern District of Texas, 119 criminal filings in the Southern District of Alabama, and 602 criminal filings in the Southern District of Florida. There was absolutely no empirical evidence or other allegation that the good faith exception had been abused.

likely to occur if offending officers (or their supervisors) were made civilly liable. In egregious cases, law enforcement officers would be much more likely to police their own since they would no longer be insulated from their conduct. See, e.g., Smith v. Hoath, 691 F.2d 220 (6th Cir. 1982), in which a supervisor was held liable under 42 U.S.C. §1983 for damages resulting from fourth amendment violations. Also, at least one state has already statutorily authorized civil actions against law enforcement officers in lieu of exclusion of evidence resulting from fourth amendment violations. See Utah Code Ann. §78-16-3 (Interim Supp. 1982).

Therefore, the predictions of doom forecast by those opposed to modifying the rule have been proven to be unfounded both in common sense and in fact. There simply has yet to be any claim sustained by

empirical evidence of the irreparable injury of any innocent citizen or group based upon a good faith exception to the exclusionary rule.

The Fifth Circuit has not been alone in establishing a good faith exception to the exclusionary rule. The Louisiana Supreme Court has followed Williams and adopted the good faith exception in upholding a search warrant based upon an affidavit from which material facts had been inadvertently but in good faith omitted. State v. Lehnen, 403 So.2d 683, 686 (La. 1981). See also Gifford v. State, 630 S.W.2d 387, 391 (Tex. Crim. App. 1982), in which it was held that the exclusionary rule would not be applied when the "police misconduct was merely technical." The Supreme Court of Virginia has also indicated that it was persuaded by the reasoning of Williams. Holloman v. Commonwealth, 275 S.E.2d 620, 622 (Va.

1981). See also Drumheller v. Commonwealth, 291 S.E.2d 602, 605 (Va. 1982) (Poff, J., concurring). The Supreme Court of Vermont applied the same rationale this court used in Michigan v. DeFillippo, supra, when it refused to order suppression of evidence seized after a search based on an allegedly unconstitutional statute. State v. Harbaugh, 326 A.2d 821 (Vt. 1974). Moreover other federal courts of appeals have adopted the rationale of Williams. See Robberson Steel Co. v. Occupational Safety and Health Review Comm., 645 F.2d 22 (10th Cir. 1980)(warrantless civil OSHA enforcement proceedings); Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020, 1024 (7th Cir. 1982)(exclusionary rule not to be applied in civil OSHA enforcement proceedings when warrant has been issued).

At least three state legislatures have already adopted some type of statutory exception to the exclusionary rule. See Utah Code Ann. §§78-16-1 and 8 ("whether the conduct of the peace officer was in good faith"); Ariz. Rev. Stat. Ann. §13-3925 ("evidence was seized by a peace officer as a result of a good faith mistake or technical violation"); Colo. Rev. Stat. §16-3-308 ("evidence was seized by a police officer...as a result of a good faith mistake or of a technical violation"). Also, the people of California, by initiative, have recently amended their constitution to prohibit exclusion of "relevant evidence." Cal. Const. Art. I, §28(d).

The reasons for modifying the exclusionary rule to allow for the admission of evidence when seized in a reasonable and good faith belief that the seizure was

lawful are compelling. The original purpose of the rule would still be effectuated since under the rationale of Williams the evidence would still be excluded if the officer's belief was not both reasonable and in good faith. The adoption of such an exception would restore integrity to the judicial system while also serving justice by reinforcing the search for truth.

Such an exception is especially appropriate under the facts of this case. The Supreme Judicial Court of Massachusetts recognized that the technical error of the magistrate, not the police, was what required suppression of highly probative evidence. Commonwealth v. Sheppard, supra, 441 N.E.2d 733. The officers acted with a reasonable good faith belief that their conduct fully complied with the law, and that is all that should be required.

Michigan v. DeFillippo, supra. Suppression of evidence in this case can in no way enhance future deterrence of police officers, and that is why the rule should be modified.

If nothing else is certain about fourth amendment law, once an improper search has occurred, the exclusionary rule benefits only those who deserve it least, while doing nothing to aid those innocent persons who have been the subjects of a fruitless search. While the Court has no vehicle to help the latter, the amici strongly urge the Court not to continue judicially sanctioning unjustified windfalls for criminal defendants who unquestionably have something to hide. See Illinois v. Gates, supra, 76 L.Ed. 561 (White, J., concurring).

D.

EVIDENCE SHOULD NOT BE EXCLUDED WHEN A SEARCH WARRANT HAS BEEN ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Regardless of whether the Court accepts the assertion found in the previous section of this brief that evidence should never be excluded in any "good faith" search and seizure, the amici emphatically submit that exclusion is inappropriate in cases involving duly issued warrants, absent a clear showing of fraud by the affiant or the unreasonable execution of the warrant.[6]

In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court held that evidence seized pursuant to a warrantless

---

[6]Of course, evidence could still be excluded if the police lie or deliberately mislead the magistrate or if the warrant is improperly executed--exclusion under those circumstances would still be consistent with the purpose of the rule. Franks v. Delaware, 438 U.S. 154 (1978). Mapp v. Ohio, supra; Illinois v. Gates, supra, 76 L.Ed.2d 565 (White, J., concurring).

arrest should have been suppressed because the police officers had enough time and information to obtain a warrant. The arrest had been made after law enforcement officers smelled burning opium in the hallway of a hotel and obtained permission from the occupant of the room from which the smell emanated to enter the room. The Court emphasized that:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. Cf. United States v. Lefkowitz, 285 U.S. 452, 464 (1932). See also Coolidge v. New Hampshire, 403 U.S. 443 (1971), in which the Court emphasized the importance of seeking from a neutral and detached

magistrate the approval to search. In that case, the search warrant had been issued by an attorney general who was also directing law enforcement efforts to find the perpetrator of a murder. Several years after Coolidge was decided, the Court again emphasized the importance of the role of a neutral and detached magistrate in the balance between society's right to thwart crime and a citizen's fourth amendment right against unreasonable searches and seizures. Gerstein v. Pugh, 420 U.S. 103 (1975).

Therefore, there is absolutely no way that the purpose of the exclusionary rule, i.e., to deter police misconduct, could ever apply in a search warrant situation (absent perjury or deceit by the officer seeking the warrant). See Brown v. Illinois, supra at 422 U.S. 612, Powell, J., concurring in part. Illinois v. Gates,

76 L.Ed.2d 564 (White, J., concurring). This Court, as well as all other aspects of the judicial system, has actively encouraged officers to seek warrants. Illinois v. Gates, supra, 76 L.Ed.2d 547. In United States v. Ventresca, 380 U.S. 102, 106 (1965), Justice Goldberg explained that in previous cases:

> [T]his Court, strongly supporting the preference to be accorded searches under a warrant, indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. In Johnson v United States, 333 U.S. 10, and Chapman v United States, 365 US 610, the Court, in condemning searches by officers who invaded premises without a warrant, plainly intimated that had the proper course of obtaining a warrant from a magistrate on the same evidence available to the police made a finding of probable cause, the search under the warrant would have been sustained.

Does it make sense then for the judiciary to exclude evidence under the guise of an unreasonable search and seizure when the police officer has obtained prior

judicial approval for the search? Does it make sense for the judiciary to exclude evidence after a judicial officer has issued a warrant which commands that a search and seizure be made? The amici submit that it obviously does not make sense, yet, as the rule is now applied, that is precisely what occurs daily all over the country. The repeated failure of both state and intermediate federal courts to give deference to a magistrate's probable cause determination as required by Ventresca runs counter to this Court's fourth amendment jurisprudence by encouraging officers not to seek warrants. Illinois v. Gates, supra, at 76 L.Ed.2d 564 (White, J., concurring).

Moreover, as Justice White noted in his dissent in Payton v. New York, 445 U.S. 573, 619 (1980), law enforcement officers today are routinely called upon to make

immediate on-the-spot "subtle discriminations that perplex even judges in their chambers." How then can it be considered prudent to expect law enforcement officers to be deterred when evidence is excluded despite the fact that a neutral and detached magistrate authorized, and, in fact, commanded a search? See Illinois v. Gates, supra, 76 L.Ed.2d 564 (White, J., concurring).

In fact, in Illinois alone, how many otherwise guilty defendants were not brought to trial between April 1, 1980, when the lower appellate court first decided the Gates case and June 8, 1983, when this Court resolved the issue? Amici submit that during this 38 month period, neither magistrates nor police officers could be aware of the correct status of the law, yet the facts supporting the original probable cause determination never changed.

During oral argument in Illinois v. Gates, the Court questioned whether Nathanson v. United States, 290 U.S. 41 (1933), would have to be overruled if the argument now being advanced by the amici were adopted (transcript of reargument at 19, 26). The amici submit that neither Nathanson nor any other warrant case[7] would have to be overruled since the judicial leap from exclusion of evidence in non-warrant cases to all fourth amendment cases was made without "an explanation" of why the rule was applicable--the Court has apparently never addressed the issue. See United States v. Ross, 456 U.S. 798, 824 (1982); Illinois v. Gates, supra, 76 L.Ed.2d 564 (White, J., concurring).

---

[7]See, e.g., Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

Nathanson and the other cases would and should still be good law concerning what a magistrate would need before probable cause could be found. All of these cases, coupled with the Court's most recent holding in Illinois v. Gates, should put to rest the hackneyed probable cause litigation and relitigation in cases like Respondent Sheppard's.

However, in response to the anguished outcries of those opposed to modifying the rule, who bleat that fourth amendment law will be forever frozen if the amici's argument is adopted, amici would point out that the Court will still have a more than ample supply of fourth amendment cases resulting from non-warrant cases which will require objective hearings to determine good faith and reasonableness. Appellate review of a trial court's probable cause determination or conclusion that a good

faith analysis is appropriate would prevent fourth amendment jurisprudence from becoming stagnant. Also, novel fourth amendment issues could still be decided in certain cases before good faith is examined. Illinois v. Gates, supra, at 76 L.Ed.2d 565 (White, J., concurring). The only difference would be that evidence would not be excluded when the purpose of the rule cannot be served. See United States v. Mahoney, supra, slip opinion at 6705, n.5.

Another concern which surfaced during the reargument in Gates was what, if anything, should be done about "improper" probable cause determinations of magistrates (transcript of reargument at 28). However, this concern overlooks that the Court has said "time and again" that the Constitution "does not 'assure uniformity of judicial decisions . . . [or] immunity

from judicial error . . . .'" Beck v. Washington, 369 U.S. 541, 554-55 (1962) quoting from Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U.S. 100, 106 (1920).

It also completely overlooks the Court's recent rationale behind applying the rule only when its deterrent purpose can be achieved. It simply makes no sense to exclude evidence allegedly to deter improper police conduct when it is the judge who has made, at worst, what can be termed an error of judgment. Can it seriously be argued that a defendant from whom incriminating evidence was obtained pursuant to an improperly issued warrant deserves the remedy of exclusion when an innocent person is afforded no remedy by the rule when he has been the object of a search conducted as a result of a warrant which should never have issued because of judicial error? They suffer the same legal

defect -- why should only the guilty be rewarded?

Moreover, there is no certainty that de novo review of the facts would reach the "correct" result. Jackson v. Virginia, 443 U.S. 307, 337, n.12 (1979)(Stephens., J., dissenting). If that were the case, then all defendants should be permitted unlimited de novo review until a judge is found who will suppress the evidence. Of course, such a procedure is neither constitutionally required nor feasible. Just as the "substantial societal costs of application of the rule" Stone v. Powell, supra at 928 U.S. 494, are outweighed by the reasons for not allowing relitigation of fourth amendment issues in federal habeas corpus cases, a neutral and detached magistrate's determination of probable cause should not be reweighed by a new judge or court. Cf., United States v. Frady, 456 U.S. 152

(1982), and Engle v. Isaac, 456 U.S. 107 (1982).

The application of the rule is especially harsh in Respondent's case because the police officers relied upon a search warrant issued by a neutral and detached magistrate. In fact, the judge who issued the warrant recognized that the appropriate form was unavailable due to the exigencies of the situation, and he assured the detective who served the warrant that he would "make the necessary changes so as to provide a suitable form of search warrant and that the warrant as delivered was sufficient authority in form and content to carry out the search as requested." Commonwealth v. Sheppard, supra, at 441 N.E.2d 730. However, the evidence was suppressed by the Supreme Judicial Court of Massachusetts because the judge "blundered" by failing to "strike out

certain words in the warrant and [by failing]...to refer to, or to attach to it, a list of the items to be seized." Id., at 441 N.E.2d 733. Highly probative evidence was excluded even though the court recognized that the "defect in the warrant was not harmful to the defendant in the circumstances of the actual search" and that the search would not have occurred any differently had "the warrant not been defective." Id. The Massachusetts court recognized that "[t]he exclusionary rule may not be well tailored to deterring judicial misconduct" (which was actually judicial oversight or error rather than misconduct) yet it applied the rule anyway, ostensibly because it felt obliged to because of this Court's opinions. Id., at 441 N.E.2d 735, 736. If the state court was correct, (but see, State v. Lehnen, supra, and the other similar cases already

cited), the amici urge this Court to change the law now before the integrity of the judicial system is further eroded by the all or nothing approach which is prevalent today.

Law enforcement officers are not supposed to second-guess judges who have commanded or authorized them to search a person or place. There is simply no reason to apply the rule in a search warrant case because the reason for the rule, i.e., police deterrence, cannot possibly exist in a case in which a warrant has been properly issued.[8] At least one commentator has

---

[8]Of course, no compelling reason exists to expand the purpose of the rule to include "deterring" neutral and detached magistrates. Absent a showing of misconduct or collusion, magistrates are presumed to be able to follow the law. The problems that arise when a magistrate's determination of probable cause is subsequently rejected usually occur from ambiguity in the law

recognized this. J. Fennelly, Warrant Searches and the Exclusionary Rule, A Rule in Search of a Reason (The Prosecutor, Journal of the National District Attorney's Assoc., Vol. 17, No. 2, Winter 1983, p. 32).

Moreover, the Court has already established in Michigan v. DeFillippo, supra, that police officers could rely in good faith on legislative enactments subsequently judicially determined to be constitutionally infirm without the sanction of the exclusion of evidence. The argument is much more compelling that a police officer may in good faith rely upon

---

caused by appellate judges far removed from the exigencies of the criminal investigation. Again, how can the exclusionary rule deter magistrates when appellate judges cannot agree on the law? See, e.g., Robbins v. California, supra; compare, Illinois v. Gates, supra, 76 L.Ed.2d 565, n.17 (White, J., concurring).

a judicial determination[9] that probable cause exists and that a warrant may lawfully issue commanding execution of the warrant. United States v. Williams, supra, at 622 F.2d 841. If not, upon whom can he rely? And if not, why has this Court commanded that police seek prior approval by the judiciary to legitimize the warrant? Coolidge, supra. Moreover,

---

[9]Respondent and his supporting amici are expected to urge that the argument advanced in this section necessarily breaks down when it is considered that not all magistrates are legally trained. However, is that as severe as the situation already approved by the Court in Gerstein v. Pugh, supra, in which it was recognized that a person could be deprived of his liberty (without judicial review) because of an indictment issued by lay grand jurors? Assuming arguendo that someone cloaked with the title of lawyer or judge is better able to determine probable cause than a lay person, it would be a simple matter for the Court to allow probable cause to be litigated de novo only when the warrant was issued by a non-lawyer. But see, Shadwick v. City of Tampa, 407 U.S. 345, 352 (1972); Illinois v. Gates, supra, 76 L.Ed.2d 546.

police officers cannot take "it upon themselves to determine...[whether the warrant] was constitutionally entitled to enforcement...." Michigan v. DeFillippo at 443 U.S. 38. If they could, why require them to go to a magistrate in the first place? The Fourth Amendment protects against unreasonable searches and seizures. This Court has already recognized in United States v. Ross, 456 U.S. 798, 823, n.32 (1982), that a search conducted pursuant to a warrant is per se reasonable. See also, Illinois v. Gates, supra, 76 L.Ed.2d 564 (White, J., concurring). Amici submit that the reasoning in Michigan v. DeFillippo "leads inexorably" to the modification of the exclusionary rule as urged by the signatories to this brief. Id. at 76 L.Ed.2d 560, n.12.

As Justice White has recognized, fourth amendment jurisprudence has evolved from

initial bright line rules which have disappeared "in a sea of ever-finer distinctions." Id., at 76 L.Ed.2d 566. Respondent's case is but just an example of how absurd the law has become. See also the majority opinion in Illinois v. Gates at 76 L.Ed.2d 545, n.9, where Justice Rehnquist identified some of the lower courts which had applied the guidelines of Aquilar and Spinelli in a "rigid" manner resulting in inflexible bright lines.

The judiciary and law enforcement branches are distinct parts of the criminal justice system. The judiciary has regularly emphasized the importance of obtaining its approval before law enforcement officers are allowed to invade someone's privacy. Coolidge v. New Hampshire, supra; Johnson v. United States, supra; United States v. Ventresca, supra. Thus, by rigid application of the rule, the

judiciary punishes both society and law enforcement while the guilty go free. This is the antithesis of common sense.

The time has come to give law enforcement officers lawful "breathing room" to operate in the harsh environment of the real world. It is also the time to restore integrity to the criminal judicial system by not applying the exclusionary rule to cases involving search warrants. See United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975). At the very minimum, society and the search for truth should not be punished because "the judge has blundered."

CONCLUSION

There is no doubt that the exclusionary rule has failed to withstand the test of time. As the rule is currently being applied across the country, it fails to deter police officers who are acting with a good faith belief that their conduct is lawful, and it also fosters disrespect for the judicial system by punishing society rather than the guilty defendant.

The rule should be modified to allow the admission of evidence in cases in which police officers acted with a reasonable, good faith belief that their conduct was lawful. However, evidence should never be excluded in cases in which a warrant has been properly secured and executed by the police after having been properly issued by a neutral and detached magistrate. Amici respectfully request the Court to seize this opportunity to correct the injustice

that a blind administration of the exclusionary rule has inflicted upon society.

Respectfully submitted,

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General

THE CAPITOL, 1502
Tallahassee, Florida 32301
(904) 488-0290

APPENDIX

1981 MID-TERM MEETING

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

ROYAL SONESTA HOTEL
NEW ORLEANS, LOUISIANA
DECEMBER 1-4, 1981

RESOLUTIONS

. . . .

III. Exclusionary Rule
(Adopted -- Maryland, Massachusetts and Oregon dissenting)

. . . .

III.

RESOLUTION

EXCLUSIONARY RULE

WHEREAS, the fundamental and legitimate purpose of the exclusionary rule, to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial has been eroded by action of the courts barring introduction of evidence of the truth, however important, if there is any investigative error, however unintended or trivial; and

WHEREAS, any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation; and

WHEREAS, evidence should not be excluded from a criminal proceeding if it has been obtained by a law enforcement officer acting in a reasonable, good faith belief that the evidence was obtained in conformity with the Fourth Amendment to the Constitution; and

WHEREAS, a showing that evidence was obtained pursuant to and within the scope of a warrant should constitute prima facie evidence of such a good faith belief; and

NOW, THEREFORE, BE IT RESOLVED that the National Association of Attorneys General supports legislation that would provide that evidence obtained in the course of a reasonable, good faith search should not be excluded from criminal trials; and

BE IT FURTHER RESOLVED that the Association authorizes its General Counsel to transmit these views to the Congress, the Administration, and other interested individuals.

Office - Supreme Court, U.S.
FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-963, 82-1711 and 82-1771

In the

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, Petitioner,

vs.

OSBORNE SHEPPARD, Respondent.

STATE OF COLORADO, Petitioner,

vs.

FIDEL QUINTERO, Respondent.

UNITED STATES OF AMERICA, Petitioner,

vs.

ALBERTO ANTONIO LEON, et al., Respondents.

On Writs of Certiorari to the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION As AMICUS CURIAE IN SUPPORT OF RESPONDENTS

ALBERT HOFELD, President
Illinois State Bar Association
Illinois Bar Center
424 So. Second St.
Springfield, IL 62701
(217) 525-1760

WILLIAM J. MARTIN
30 No. Dearborn
Chicago, IL 60602
(312) 621-1400

JOSHUA SACHS*
307 No. Dearborn, Suite 700
Chicago, IL 60610
(312) 236-0400
*Attorney of Record

MICHAEL J. COSTELLO
215 So. Grand Avenue West
Springfield, IL 62704
(217) 789-2951

MARTIN P. MOLITZ
7936 No. Winchester
Chicago, IL 60626
(312) 274-6200

Attorneys for Amicus Curiae
ILLINOIS STATE BAR ASSOCIATION

QUESTION PRESENTED

Whether *Illinois* v. *Gates*, ... U.S. ..... (No. 81-430, 1983), has obviated the need to consider a "reasonable good faith mistake" exception to the Fourth Amendment exclusionary rule.

TABLE OF CONTENTS

PAGE

Interest of *Amicus Curiae* Illinois State Bar Association 1

Summary of Argument 2

Argument 5

I. CREATION OF A "REASONABLE GOOD FAITH MISTAKE" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE IS FORECLOSED BY THIS COURT'S RECENT DECISION IN ILLINOIS V. GATES .. 5

A. THERE CAN BE NO SUCH THING, UNDER *GATES*, AS AN OBJECTIVELY REASONABLE GOOD FAITH MISTAKE OF PROBABLE CAUSE 6

B. RESTRICTION OF THE EXCLUSIONARY RULE IN THE WAKE OF *GATES* WOULD CONFUSE AND WEAKEN THE MEANING OF PROBABLE CAUSE 8

C. *GATES* HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANT CASES 10

D. *GATES* HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANTLESS SEARCH CASES 10

II. WHERE A SEARCH IS UNDERTAKEN PURSUANT TO A WARRANT THE GOOD FAITH OF THE POLICE OFFICER IS IRRELEVANT AND THE EXISTENCE OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE HAS NO APPLICATION 11

PAGE

III. EXCLUSION OF UNLAWFULLY SEIZED EVIDENCE REMAINS THE BEST AND MOST APPROPRIATE REMEDY WHERE THE SEIZURE TAKES PLACE PURSUANT TO A WARRANT ERRONEOUSLY ISSUED UPON SOMETHING LESS THAN THE CONSTITUTIONALLY MANDATED STANDARD OF PROBABLE CAUSE 13

IV. THE FEDERAL EXCLUSIONARY RULE EVEN IN ITS PRESENT FORM IS INAPPLICABLE TO MASSACHUSETTS V. SHEPPARD AND THIS UNIQUE CASE IS AN INAPPROPRIATE VEHICLE FOR RE-EXAMINATION OF THE RULE 18

Conclusion 20

TABLE OF AUTHORITIES

Aguilar v. *Texas*, 378 U.S. 108 (1964) 3, 5

Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 18

Brinegar v. *United States*, 338 U.S. 160 (1949) 3, 6, 11, 14

Carroll v. *United States*, 267 U.S. 132 (1925) 14

Draper v. *United States*, 358 U.S. 307 (1959) 11

Elkins v. *United States*, 364 U.S. 206 (1960) 16

Franks v. *Delaware*, 438 U.S. 154 (1978) 11

Husty v. *United States*, 282 U.S. 694 (1931) 14

Illinois v. *Gates*, ... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983) ..... *passim*

Mapp v. *Ohio*, 367 U.S. 643 (1962) 16, 18

PAGE

Spinelli v. *United States*, 393 U.S. 410 (1969) 3, 5
Stone v. *Powell*, 428 U.S. 465 (1976) 13-14, 18
United States v. *Calandra*, 414 U.S. 338 (1974) 13
United States v. *Janis*, 428 U.S. 433 (1976) 14
Weeks v. *United States*, 232 U.S. 383 (1914) 13, 16, 18
Wolf v. *Colorado*, 338 U.S. 25 (1949) 16
United States Constitution, Amendment IV 13
Illinois Revised Statutes, Ch. 38, Sec. 108-14 19
LaFave, *Search and Seizure*, 1978 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Nos. 82-963, 82-1711 and 82-1771

COMMONWEALTH OF MASSACHUSETTS, Petitioner,

vs.

OSBORNE SHEPPARD, Respondent.

STATE OF COLORADO, Petitioner,

vs.

FIDEL QUINTERO, Respondent.

UNITED STATES OF AMERICA, Petitioner,

vs.

ALBERTO ANTONIO LEON, et al., Respondents.

On Writs of Certiorari to the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE ILLINOIS STATE BAR ASSOCIATION

The Illinois State Bar Association is a state-wide voluntary professional association of attorneys of the

State of Illinois. Its membership consists of approximately 25,000 lawyers and judges, and includes the majority of Illinois attorneys. The Association has traditionally taken an active role in public education on legal issues and legal reform in the public interest. It maintains special section councils in areas of substantive law, including criminal justice.

The Association, through the section council on criminal justice, has frequently examined and debated the exclusionary rule. In December of 1981, the Board of Governors of the Association adopted a resolution supporting continuation of the present exclusionary rule and subsequently authorized filing of an *amicus curiae* brief in this Court supporting continuation of the rule in its present form.

During the Court's October, 1982 term, the Association filed a brief as *amicus curiae* in *Illinois* v. *Gates,* No. 81-430.

The Board of Governors has specifically authorized the preparation and filing of an *amicus curiae* brief in support of Respondents in the present cases.

SUMMARY OF ARGUMENT

The time for a "reasonable good faith mistake" exception to the exclusionary rule is over. The claimed benefits of the proposed exception cannot survice this Court's decision in *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983). The proposal found its justification in the supposed futility of suppressing evidence where the searching officer believed, both subjectively and in objectively reasonable good faith, that his actions did not violate the Fourth Amendment.

The concept of an objectively reasonable good faith mistake is meaningless in light of *Gates,* which abandoned the technical analysis of *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969), in favor of the original "totality of circumstances" test of earlier cases such as *Brinegar* v. *United States,* 338 U.S. 160 (1949). In determining probable cause the courts look once again to "probabilities" and "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Law enforcement officers and magistrates look to "common-sense conclusions about behavior."

Probable cause exists, under *Gates,* where the "practical, common-sense" consideration of all the circumstances shows "a fair probability that contraband or evidence of a crime will be found in a particular place."

Under this simplified test for probable cause there is no room for a mistake which is made in good faith and yet is, at the same time, objectively reasonable.

Gates has incorporated objective reasonableness into the test of probable cause itself. To go further and hold that the remedy of exclusion should be unavailable to redress a search which fails to meet this test would entrust the Fourth Amendment to the discretion of the police.

Although the exclusionary rule is not made explicit by the Fourth Amendment, that Amendment does explicitly require probable cause as the precondition of a lawful search, and it unquestionably presupposes that its commandment will be obeyed. Obedience demands enforcement, which in turn demands a remedy.

The exclusionary rule is the only fair, practical and effective remedy for Fourth Amendment violations. It is directed toward the illegal evidence, not toward punishment of the erring officer.

The good faith belief of the searching officer is immaterial where the search is conducted pursuant to a warrant. Where the search is without a warrant, a good faith exception threatens the integrity of the probable cause standard.

Under exceptional circumstances, a mere clerical error or oversight in an otherwise valid warrant may not involve any Fourth Amendment violation and would not justify exclusion of evidence. Even in this situation, however, good-faith analysis is not helpful.

ARGUMENT

I.

CREATION OF A "REASONABLE GOOD FAITH MISTAKE" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE IS FORECLOSED BY THIS COURT'S RECENT DECISION IN ILLINOIS V. GATES.

The "reasonable good faith mistake" exception is an idea whose time is over. There is no place for the contemplated exception under the practical, common-sense standard of probable cause re-enunciated by this court in *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (No. 81-430, 1983)

By rejecting the highly analytical system of probable cause determination which evolved after *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969) and incorporating objective reasonableness into the probable cause determination itself, *Gates* has made an objectively reasonable mistake a logical and practical impossibility. Freeing the magistrate, any by extension the officer acting without a warrant, to exercise discretion based upon the totality of the circumstances, *Gates* has also rendered the uncertainty inherent in a "good faith mistake" exception intolerable.

Whatever the justifications for the exception may have been in the past, they cannot survive *Gates.* Whatever the excessive costs of the exclusionary rule may have been in the past, *Gates* has cured them. A double cure, combining the restated probable cause standard with virtual elimination of the remedy for violation, is far

more dangerous than any defects of the exclusionary rule. The complaints asserted by petitioners have been remedied by *Gates*.

A.

THERE CAN BE NO SUCH THING, UNDER GATES, AS AN OBJECTIVELY REASONABLE GOOD FAITH MISTAKE OF PROBABLE CAUSE.

Gates reemphasized what had often been forgotten in Fourth Amendment analysis; namely, that the probable cause standard itself incorporates the concept of objective reasonableness. Quoting from *Brinegar* v. *United States*, 338 U.S. 160 (1949), *Gates* reminds us that,

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* at 175, quoted in *Gates*, 103 S.Ct. at 2328.

This lesson runs throughout the *Gates* decision. "[P]robable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, or even usefully, reduced to a set of legal rules." 103 S.Ct. at 2328. Veracity, reliability and basis of knowledge are "better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations." 103 S.Ct. at 2329.

Putting aside multiple-prong and convoluted tests, designed to guide the magistrate's discretion but in the end becoming an overgrown impediment to it, the Court once

again looks to the heart of the determination, concluding that where there exists a "substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." 103 S.Ct. at 2331.

In a summary of its ruling, *Gates* states,

> ". . . [W]e conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. [citations omitted] The task of the magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." 103 S.Ct. at 2332.

Lest this deference to the practical discretion of the magistrate be misconstrued as a reduction in the actual standard of probable cause, *Gates* warned that "[i]n order to ensure that . . . an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." 103 S.Ct. at 2332.

Although a bare-bones conclusory affidavit is obviously inadequate, merely going beyond this is not necessarily sufficient. The capsule rule of *Gates* is that when an affidavit offering more than mere conclusions is tested, the same level of probable cause as before is to be sought by a "flexible, common-sense" standard, rather than by means of rigidly prescribed rules. 103 S.Ct. at 2333.

With its emphasis on the flexible, the common-sense, the practical, and its explicit reaffirmation of the "reason-

able and prudent man" standard of *Brinegar*, *Gates* has incorporated the concept of "objective reasonableness" into the determination of probable cause itself. It is difficult to see how probable cause could ever be found under *Gates* if the totality of the circumstances did not lead to an objectively reasonable belief adequate to overcome the suspect's Fourth Amendment rights. And an absence of practical, common-sense, probable cause would render an objectively reasonable good faith mistake a contradiction in terms. Subjective good faith mistake there well might be, but no responsible advocate of the good faith exception has had the temerity to suggest that this should be adequate to avoid suppression. Cf. *Illinois* v. *Gates*, concurring opinion of Justice White.

B.

RESTRICTION OF THE EXCLUSIONARY RULE IN THE WAKE OF GATES WOULD CONFUSE AND WEAKEN THE MEANING OF PROBABLE CAUSE.

Nothing in *Gates* was intended to dilute or diminish the meaning of probable cause. Part III of the Court's opinion leaves no doubt that, although the method for determining that standard has been simplified and clarified, the actual standard has in no way been reduced.

Nevertheless, just as certain language in *Aguilar* and *Spinelli* has been misread into a test of untenable rigidity, the emphasis in *Gates* on flexible, practical common-sense poses the danger of unduly lax construction. The concurring opinion of Justice White foresees precisely this danger and warns, ". . . as I read the majority opinion, it appears that the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates." 103 S.Ct. at

2350; Justice White, concurring. The dissenting opinion of Justice Brennan expresses concern that "words such as 'practical,' 'non-technical,' and 'common-sense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment," 103 S.Ct. at 2359; Justice Brennan, dissenting. Although the opinion of the Court makes it clear that no such derogation is intended, 103 S.Ct. at 2333-2334, the fact remains that *Gates*, like its predecessors, is subject to misconstruction and overly permissive interpretation by lower courts, magistrates and police agencies.

Yet with *Gates* hardly six months old, this Court is once again invited to engraft a large, vague and illogical exception onto the exclusionary rule.

The case for restricting the exclusionary rule is stated in Justice White's concurrence in *Gates*. But Justice White proposed modification of the rule as an alternative to abandonment of *Aguilar* and *Spinelli*. The Court chose instead to restrict *Aguilar* and *Spinelli*, and left the exclusionary rule intact.

Petitioners continue, however, to press for a good faith exception as though *Gates* had never been decided. Thus, although the brief of the United States is replete with citations to the concurring opinion in *Gates*, it pays scant heed to the opinion of the Court, and it never comes to grips with the fact that *Gates* has radically altered the context in which the future of the exclusionary rule must be judged.

C.

GATES HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANT CASES.

Under *Gates*, the totality of the circumstances must be viewed as "the factual and practical considerations of everyday life on which reasonable and prudent men . . . act." 103 S.Ct. at 2328. If this test, which includes the concept of objective reasonableness at its very heart, is not met, then no amount of good faith on the part of the police officer can make the search reasonable or constitutional.

Even before the *Gates* decision, the application of a "good faith mistake" test to the warrant situation was fraught with dangers and difficulties. (see Argument *II., infra.*) In light of that decision it is pointless. Objective reasonableness is part of probable cause. A search without probable cause can never be objectively reasonable.

D.

GATES HAS OBVIATED THE NEED TO CONSIDER A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WARRANTLESS SEARCH CASES.

Even though *Gates* was decided in the context of a search based upon a warrant, it obviates the need to consider a good faith exception in warrantless search cases as well. Whether a search is conducted with a warrant or without, probable cause remains probable cause. The practical, common-sense standard employed by the magistrate in passing on a warrant application must, of necessity, be employed by a judge reviewing the discretion of an officer acting under an exception to the warrant requirement.

And if under the totality of circumstances test in a warrantless search the searching officer fails to meet the standard of a reasonable and prudent man, *Brinegar* v. *United States,* 338 U.S. 160, 171 (1949), *Draper* v. *United States,* 358 U.S. 307 (1959), *Illinois* v. *Gates,* ..... U.S. ....., 103 S.Ct. 2317 (1983), though he may have had good faith, that good faith cannot be reasonable.

II.

WHERE A SEARCH IS UNDERTAKEN PURSUANT TO A WARRANT THE GOOD FAITH OF THE POLICE OFFICER IS IRRELEVANT AND THE EXISTENCE OF A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE HAS NO APPLICATION.

Even before *Gates,* the good faith mistake exception made no sense in a warrant case. The subjective good faith or bad faith of a police officer is irrelevant where a search and seizure is conducted pursuant to a warrant. Although a perjured affidavit may render invalid a warrant which bears no defect on its face, *Franks* v. *Delaware,* 438 U.S. 154 (1978), the opinion of the officer as to whether the magistrate was right or wrong in issuing the warrant has no other bearing on the application of the exclusionary rule.

Where a warrant has been sought and actually has issued the officer's opinion as to the reasonableness of the search or of the warrant is of no importance. There is no reason, in law, logic or policy to countenance a rule which places on the police officer the obligation or duty to second guess the magistrate or sit in his squad car as a court of review over Fourth Amendment determinations.

The true issue in a warrant case has nothing to do with good faith or reasonable mistakes on the part of the police. It is instead whether, regardless of the subjective beliefs of the police officer, evidence seized pursuant to a warrant issuing on inadequate facts is to be immune from exclusion.

If the warrant is valid it is of no consequence that the officer believes the judge wrong. And if the warrant is invalid it is of no matter that the officer assumes, as he naturally would, that the judge was correct. The officer's duty is to assemble such evidence as is available in support of the proposed search, reduce it to the form of an affidavit, and submit it to a magistrate for decision as to whether or not the constitutional standard has been met. Once the affidavit has been submitted the officer's Fourth Amendment duty has been fulfilled, and the officer has no choice but to accept the magistrate's ruling and search or not search as the decision may be.

Once the warrant has issued the inquiry must go not to the beliefs of the officer but rather to the correctness or error of the magistrate. If probable cause has been shown then the Fourth Amendment rights of the subject of the search have been protected. If, on the other hand, the magistrate has signed a warrant without probable cause then the subject has suffered an infringement of rights for which a remedy must be available. It is a most peculiar notion that vindication of those rights should be barred because the officer on his way to execute the warrant is unaware that it is defective. The error and the infringement has been made by the court and it makes no sense to create a level of artificial insulation between the court and its error by creating a rule that if the ministerial officer who serves and exe-

cutes a bad warrant upon order of court believes it valid then the remedy which would otherwise follow is to be denied.

The continued general application of the exclusionary rule as the remedy for illegal searches and seizures based upon judicial warrants depends upon whether the rule is a necessary and constitutionally mandated corollary to the Fourth Amendment or whether, if not, it is nevertheless the most practical and reasonable remedy for violation of Fourth Amendment rights. The application in any individual case cannot, and should not, depend upon the subjective opinions of the police officer who obtains or executes the warrant as to whether it is valid or reasonable.

III.

EXCLUSION OF UNLAWFULLY SEIZED EVIDENCE REMAINS THE BEST AND MOST APPROPRIATE REMEDY WHERE THE SEIZURE TAKES PLACE PURSUANT TO A WARRANT ERRONEOUSLY ISSUED UPON SOMETHING LESS THAN THE CONSTITUTIONALLY MANDATED STANDARD OF PROBABLE CAUSE.

The probable cause standard for searches and seizures is the explicit mandate of the Constitution. The Fourth Amendment plainly states that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. Constitution, Amdt. IV. Whether the exclusionary rule is similarly mandated is less clear. Early cases, including the seminal *Weeks* v. *United States*, 232 U.S. 383 (1914), view exclusion of illegally seized evidence as flowing inevitably from the Fourth Amendment, while such later cases as *United States* v. *Calandra*, 414 U.S. 338 (1974) and *Stone* v. *Powell*, 428

U.S. 465 (1976) have construed the rule as a judicial remedy not necessarily required by the Constitution.

However that may be, it cannot be denied that probable cause as the basis of every warrant is no mere judicial construction but is as clear a command as any to be found in the entire Constitution. And the Fourth Amendment requirement that searches and seizures shall not be "unreasonable" has been consistently held to mean that the same standard of probable cause must be met whether the search and seizure is conducted with a warrant or without; compare *Carroll* v. *United States*, 267 U.S. 132 (1925)("reasonable grounds") with *Husty* v. *United States*, 282 U.S. 694 (1931)("probable cause") and *Brinegar* v. *United States*, 338 U.S. 160 (1949).

We need not disagree with cases holding that exclusion is not applicable to proceedings before a grand jury, *Calandra*, or to collateral review, *Stone*, or to a civil action, *United States* v. *Janis*, 428 U.S. 433 (1976), to conclude that they are not good guidance for criminal cases in which the government seeks to admit unlawfully seized evidence into the very prosecution for which the seizure was undertaken. It may be true that in the *Calandra*, *Stone* and *Janis* situations the benefits of exclusion are so slight and attenuated that the rule's effect on the evidence becomes the more important consideration.

This is not so where the fruits of an unlawful search are offered in the initial criminal prosecution. It is in that context that the warrant is actually sought and the existence or nonexistence of probable cause determined. To admit or refuse evidence in other types of proceed-

ings will have little effect on the fate of the probable cause standard. But to allow the results of Fourth Amendment violations into the initial criminal prosecution will have an immediate and deleterious effect on the very concept of probable cause and on the ability of the courts to enforce the protection of the Fourth Amendment.

The exclusionary rule has the merit of providing a remedy for any unlawful search and seizure, not merely for one which is intentional or extreme. If probable cause is to have any meaning it must be protected from well intentioned misapplication as well as from deliberate flouting. A substitute rule which would provide, as most suggested substitutes have, for some form of damages or discipline against the searching officer is both cruelly inappropriate and socially dangerous when applied in the case of accidental error. It has been objected that the exclusionary rule does not deserve to be applied to a good faith error. Yet it is far more unfair to impose damages or punishment upon the individual officer guilty of a well-motivated mistake.

The most dangerous feature of a rule imposing sanctions on the officer is that it will intimidate the police from performance of their duties. Under the present rule, the officer is not afraid to act in a doubtful case, knowing that if he errs the remedy will be directed where it belongs—against the improperly obtained evidence and not against him. Under virtually every other proposal the remedy is directed against the officer, with the result that either no remedy at all will exist for an honestly meant violation of a basic right, or else that because a remedy is available the police will be reluctant to leave their squad cars.

The exclusionary rule remains superior to any alternative, and the decision of almost every state to stay with the rule when it was not required remains persuasive evidence of this superiority.

The exclusionary rule for search and seizure cases has been the law in the federal courts since 1914, *Weeks* v. *United States,* 232 U.S. 383 (1914), but it did not become binding upon the states until forty-eight years later, *Mapp* v. *Ohio,* 367 U.S. 643 (1962). Throughout the intervening period the states were free to devise any other means they might choose to enforce constitutional privacy protections. Indeed, between 1949 and 1962 it was the explicit rule established by this court that although the Fourth Amendment was applicable to the states through the Fourteenth Amendment, the exclusionary rule was not. *Wolf* v. *Colorado,* 338 U.S. 25 (1949).

The absence of response to *Weeks* and *Wolf* suggests that there is no satisfactory substitute and that the exclusionary rule, whatever its shortcomings may be, remains preferable to any alternative, cf. *Elkins* v. *United States,* 364 U.S. 206 (1960).

Opponents of the exclusionary rule point to the social cost of not using presumably reliable evidence only because it has been improperly obtained. There is, to be sure, an unascertainable cost in making such evidence unavailable. It is not the exclusionary rule, however, which imposes that cost. It is the requirement that a search not take place in the absence of probable cause. Those who deplore the cost have a quarrel not with the procedural rule of exclusion, but with the substantive rule of the Fourth Amendment. Their remedy is not

to overrule *Weeks* or *Mapp* but to remove the requirement of probable cause from the Constitution.

Accusations against the exclusionary rule based upon its supposed cost are revealed as fallacious in an excerpt from a recent and highly respected treatise, La Fave on *Search and Seizure,*

> "The nature of the exclusionary rule is such that it makes the cost of honoring the Fourth Amendment apparent. As Professor Kaplan has observed, 'by definition it operates only after incriminating evidence has already been obtained' and thus 'flaunts before us the cost we must pay for the fourth amendment guarantees.' But it is not correct that the cost is attributable to the exclusionary rule. Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. 'To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally.' It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted." La Fave, *Search and Seizure,* Vol. 1, p. 23, (1978).

Nowhere is the absence of an alternative to the exclusionary rule so apparent as in the final pages of the Government's brief. (Brief of the United States, at 86-88) The plain fact is that we maintain the exclusionary rule because every alternative proposed to date is worse.

There may be alternative remedies for willful violations. The offending officer could be reprimanded, suspended, demoted, dismissed, fined or, in the most outrageous cases,

prosecuted and imprisoned. And where the subject of the search turns out to be innocent the civil tort remedy may have occasional practical value. But where, as is more often the case, the violation is a blunder, however severe, no other realistic remedy exists.

The government falls back on the assertion that existence of the exclusionary rule has discouraged the evolution of other remedies, a claim which is factually untrue and logically upside-down.

No issue of criminal procedure has received more attention and argument than the exclusionary rule. The challenge to find something better has been before the legal community since 1914, *Weeks* v. *United States*, 232 U.S. 383, and has been looking fifty state legislatures squarely in the eye since 1962, *Mapp* v. *Ohio*, 367 U.S. 643. For years members of this Court have indicated less than complete happiness with the rule, see e.g. *Stone* v. *Powell*, 428 U.S. 465 (1976), *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, (1971), Burger, C.J., dissenting. No good answer has been given. During oral argument in *Gates* the Solicitor General was unable to suggest an alternative in response to a direct invitation from Justice Marshall.

IV.

THE FEDERAL EXCLUSIONARY RULE EVEN IN ITS PRESENT FORM IS INAPPLICABLE TO MASSACHUSETTS V. SHEPPARD AND THIS UNIQUE CASE IS AN INAPPROPRIATE VEHICLE FOR RE-EXAMINATION OF THE RULE.

The exclusionary rule is a remedy for violations of the Fourth Amendment. Where no Fourth Amendment

violation has occurred the federal exclusionary rule, even its present form, does not apply. The Supreme Judicial Court of Massachusetts was in error in invoking the rule as a matter of federal constitutional law in the *Sheppard* case, 82-963. Because invocation was unnecessary even under present law, *Sheppard* is an improper vehicle for re-examination of that rule.

In *Sheppard* a warrant application was presented which fully satisfied the requirements of both probable cause and specificity. A magistrate reviewed and approved the application, and his determination that all constitutional requirements were properly met is not disputed.

Due to an exceptional clerical oversight, the face of the warrant failed to reflect the specificity which the magistrate had in fact reviewed and found. The searching officers, however, relied on their information as contained in the application rather than on the interlineated warrant form. The person searched did not rely on the specificity language of the warrant form.

There is no Fourth Amendment violation on these facts. Where both probable cause and specificity have been fully demonstrated to the magistrate, a mere clerical oversight on the face of the warrant, noticed by no one and relied upon by no one, has transgressed no constitutional right. Exclusion of evidence may have been required by Massachusetts law. It was not required by the Fourth Amendment.

Amicus respectfully calls the Court's attention to a statute from its own state which is the appropriate method of handling such a case. Ill.Rev.Stat., Ch. 38, § 108-14, provides:

> No warrant shall be quashed nor evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.

The good faith beliefs of the officers, reasonable or not, are immaterial on these facts because the search was not unconstitutional. It would be a mistake for this Court to misuse a valid search mildly tainted by nonprejudicial clerical error as a vehicle for re-examining so important a doctrine as the exclusionary rule.

CONCLUSION

The exclusionary rule should not be modified, and the proposed "reasonable good faith mistake" exception should be firmly rejected.

Amicus respectfully suggests that *Massachusetts* v. *Sheppard* does not involve any Fourth Amendment violation; that invocation of the exclusionary rule by the Supreme Judicial Court of Massachusetts was not required by federal constitutional law; and that application of "reasonable good faith mistake" analysis to this case is highly inappropriate and would constitute an advisory opinion.

Amicus believes that consideration of the searching officer's belief as to the validity of a regularly issued warrant is not proper and that "reasonable good faith mistake" analysis has no place in review of a search pursuant to a warrant.

Amicus also respectfully submits that *Gates* v. *Illinois* has obviated any need to consider a "reasonable good faith mistake" exception. Whatever the case may have been before, *Gates* has made modification of the exclusionary rule unnecessary, unwise and illogical.

Respectfully submitted,

THE ILLINOIS STATE BAR ASSOCIATION, *Amicus Curiae,*

By: .....
Attorney for *Amicus Curiae*

ALBERT HOFELD, President
Illinois State Bar Association
Illinois Bar Center
424 So. Second St.
Springfield, IL 62701
(217) 525-1760

WILLIAM J. MARTIN
33 No. Dearborn
Chicago, IL 60602
(312) 641-1466

JOSHUA SACHS*
127 No. Dearborn, Suite 930
Chicago, IL 60602
(312) 236-7442

MICHAEL J. COSTELLO
215 So. Grand Avenue West
Springfield, IL 62704
(217) 753-0201

MARTIN P. MOLTZ
7306 No. Winchester
Chicago, IL 60626
(312) 274-8596

Attorneys for *Amicus Curiae*
ILLINOIS STATE BAR ASSOCIATION

* Attorney of Record

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-963

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

OSBORNE SHEPPARD,
Respondent

RECEIVED
DEC 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
DEC 12 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

MOTION TO STRIKE THE BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Osborne Sheppard, the respondent in the above entitled case, hereby moves the Court to strike the brief of the Illinois State Bar Association as Amicus Curiae in support of the respondent for failure to comply with the requirements of Rule 36.2.

Rule 36.2 requires that a brief of an amicus curiae must be filed "within the time allowed for the filing of the brief of the party supported and if in support of neither party, within the time allowed for filing appellant's or petitioner's brief." The Brief of the Illinois State Bar Association as amicus curiae supports the position of the petitioner, the Commonwealth of Massachusetts, rather than the position of the respondent. See Brief of the Illinois State Bar Association at 18-20; Brief for the Petitioner at 28-32. However, the amicus brief was not filed within the time allowed for the filing

of the brief of the petitioner and was not served on counsel for the respondent until after the respondent's brief had been filed. As a result of the late filing of the brief, the respondent had no notice of the arguments made by amicus and no opportunity to respond to them.

By his attorney,

John Reinstein
Civil Liberties Union of Massachusetts
47 Winter Street
Boston, Massachusetts 02108
(617) 482-3170

Nancy Gertner
Silverglate, Gertner, Baker & Fine
88 Broad Street
Boston, Massachusetts 02110
(617) 542-6663

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing motion to strike the Brief of the Illinois State Bar Association as Amicus Curiae in Support of Respondent by mailing a copy thereof by first class mail to the following counsel of record:

Barbara A.H. Smith
Assistant Attorney General
One Ashburton Place
Boston, MA 02108

Joshua Sachs
127 No. Dearborn
Chicago, IL 60602

John Reinstein

December 9, 1983

No. 82-963

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

-v-

OSBORNE SHEPPARD,

Respondent.

RECEIVED
DEC 1 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

On Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

RESPONSE OF AMICUS CURIAE ILLINOIS STATE BAR ASSOCIATION TO RESPONDENT'S MOTION TO STRIKE

The Illinois State Bar Association, amicus curiae, responds to the motion of Respondent to strike its brief as follows:

1. By consent of all parties, the Illinois State Bar Association filed a single brief in support of respondents in this case and in two related cases, United States v. Leon, No. 82-1771, and Colorado v. Quintero, No. 82-1711;

2. The question addressed by amicus curiae in all three cases was whether the exclusionary rule as a remedy for searches in violation of the fourth amendment should be modified by creation of an exception for errors made in objectively reasonable good faith;

3. Amicus curiae argued that no such exception should be created and therefore filed its brief in support of the Respondents in each case;

4. In addition, amicus included an argument appearing in its brief as Argument IV (pages 18-20), suggesting that the case of Massachusetts v. Sheppard was not an appropriate vehicle for review or modification of the exclusionary rule;

5. Respondent Sheppard has moved to strike the brief of amicus curiae, contending that Argument IV in fact supports the position of Petitioner in his case, and that the brief is therefore an amicus curiae brief in support of the Petitioner and as such not timely filed under Rule 36.2;

6. Amicus respectfully submits that its brief opposes the creation of an exception to the exclusionary rule, that this is the principal issue before the Court in each of the three cases, and that amicus has properly filed in support of Respondents and is not in violation of Rule 36.2;

7. Amicus further notes that it has not been made aware of any objection to its brief by Respondents in the Leon or Quintero cases;

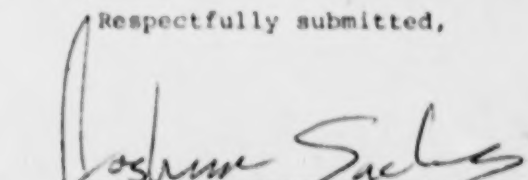
8. Amicus further notes that the objection of Respondent Sheppard appears to be confined to Argument IV of its brief.

WHEREFORE, Amicus Curiae Illinois State Bar Association respectfully moves that the motion of Respondent Sheppard to strike its brief for alleged violation of rule 36.2 be denied.

AND FURTHER Amicus Curiae suggests that in the event that this court finds that rule 36.2 may have been violated, any such violation may be cured by striking Argument IV (pages 18-20) only, in that no specific objection has been made to any other portion of its brief; or by granting Respondent an opportunity to respond to such material as it believes is not in support of its position.

AND FURTHER, Amicus Curiae notes that any remedy afforded on Respondent's motion should apply only to this case and not to United States v. Leon, No. 82-1771 and Colorado v. Quintero, No. 82-1711, in which cases no party has objected to its brief.

Respectfully submitted,



Joshua Sachs
Attorney for Amicus curiae
Illinois State Bar Association
127 N. Dearborn Street
Suite 930
Chicago, IL 60602

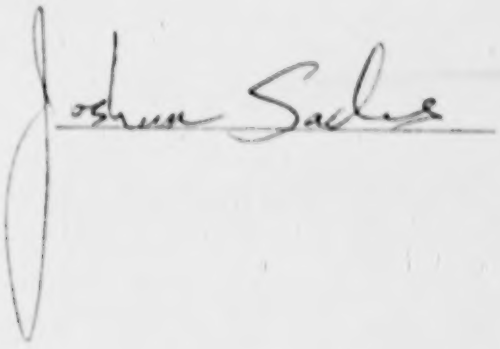
312/236-7442

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing RESPONSE OF AMICUS CURIAE ILLINOIS STATE BAR ASSOCIATION TO RESPONDENT'S MOTION TO STRIKE by mailing a copy first class mail, postage prepaid, on December 12, 1983, to counsel of record as follows:

John Reinstein
Civil Liberties Union of Massachusetts
47 Winter Street
Boston, Massachusetts 02108

Barbara A. H. Smith
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108



Dec. 12, 983

(THIS PAGE INTENTIONALLY LEFT BLANK)

FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-963, 82-1711 and 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

—v.—

OSBORNE SHEPPARD, *Respondent.*

STATE OF COLORADO, *Petitioner,*

—v.—

FIDEL QUINTERO, *Respondent.*

UNITED STATES OF AMERICA, *Petitioner,*

—v.—

ALBERTO ANTONIO LEON, ET AL., *Respondents.*

BRIEF AMICUS CURIAE OF DAN JOHNSTON COUNTY ATTORNEY POLK COUNTY, IOWA, IN SUPPORT OF RESPONDENTS

DAN JOHNSTON
Counsel of Record
Polk County Attorney
5th & Mulberry
Des Moines, Iowa 50309
(515) 286-3737

November 1983

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	i
INTEREST OF AMICUS CURIAE	1
ARGUMENT.	3
I. THE EXCLUSIONARY RULE DOES NOT ACT AS A SUBSTANTIAL IMPEDIMENT TO THE CONVICTION OF THE GUILTY.	5
II. THE EXCLUSIONARY RULE IS NECESSARY TO EMPHASIZE THE SERIOUSNESS OF OUR SOCIETY'S COMMITMENT TO FOURTH AMENDMENT VALUES.	14
III. RECOGNITION OF A GOOD FAITH DEFENSE TO THE EXCLUSIONARY RULE WOULD INTRODUCE UNNECESSARY COMPLEXITY INTO THE CRIMINAL PROCESS AND WOULD ENCOURAGE POLICE TO REMAIN IGNORANT OF EVOLVING FOURTH AMENDMENT DOCTRINE.	16

Page

A. The Good Faith Defense is Administratively Unworkable. 17

B. The Good Faith Defense Places a Premium on Ignorance 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES	PAGE
Delaware v. Prouse, 440 U.S. 648 (1979).	19, 20
Draper v. United States, 358, U.S. 307 (1959)	13
Franks v. Delaware, 438 U.S. 154 (1978).	11, 13
Gustafson v. Florida, 414 U.S. 260 (1973).	10
Hill v. California, 401 U.S. 797 (1971).	11
Illinois v. Gates, ___ U.S. ___, 103 S. Ct. 2317 (1983).	1, 12
Mapp v. Ohio, 367 U.S. 643 (1961). . .	4, 14, 15, 16
Rakas v. Illinois, 439 U.S. 128 (1978).	11
Rawlings v. Kentucky, 448 U.S. 98 (1980)	11
Schneckloth v. Bustamonte, 412 U.S. 218 (1973).	10
Sibron v. New York, 392, U.S. 40 (1968).	10
Smith v. Maryland, 442 U.S. 735 (1979).	11

TABLE OF AUTHORITIES (Cont'd.)

CASES PAGE

South Dakota v. Opperman,
428 U.S. 364 (1976). 11

Terry v. Ohio,
392 U.S. 1 (1968). 10

United States v. Calandra,
414 U.S. 338 (1973). 11

United States v. Miller,
425 U.S. 438 (1976). 11

United States v. Robinson,
414 U.S. 218 (1973). 10, 13

United States v. Ross,
102 S. Ct. 2157 (1982) . . . 11

United States v. Salvucci,
448 U.S. 83 (1980) 11

MISCELLANEOUS

Brosi, A Cross-City Comparison of Felony Case Processing,
(INSLAW 1979) 6

Davies, What We Know (And Still Need to Learn) About the Costs of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 American Bar Foundation Research Journal, No 3 (Forthcoming) 8

MISCELLANEOUS (Cont'd)

Page

Kaplan, The Limits of the Exclusionary Rule 26 Stan L. Rev. 1027, 1044 (1971). . . . 20

W. LaFave, Search and Seizure, § 1.2, n.9 (1981) (Supp) 6

Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Research Journal, No 3 (Forthcoming) . . . 7

INTEREST OF AMICUS CURIAE

Amicus Curiae, as the duly elected County Attorney of Polk County, Iowa, encompassing the City of Des Moines, is charged with the principal responsibility for the prosecution of criminal offenders in Polk County, Iowa. In Illinois v. Gates, 81-430, amicus, as a concerned law enforcement official, filed a brief amicus curiae opposing the introduction of a good faith exception to the exclusionary rule. Amicus argued in Gates that the exclusionary rule provides a significant impetus toward adherence to Fourth Amendment values in the day to day administration of the criminal justice system. Rather than serving as an impediment to effective law enforcement, amicus has found the costs to public safety of the exclusionary rule virtually non-existent and has perceived

the rule as a principal contribution to increased police professionalism and training. Moreover, the proposed good faith exception to the exclusionary rule would inject new and difficult factual issues into the routine administration of the criminal justice system which would increase the resources needed to dispose of a case without providing additional protection against crime.

Amicus believes that pre-occupation with the politically charged issue of the exclusionary rule fosters the dangerous illusion that crime can be reduced by watering-down our constitutional heritage. In the opinion of amicus, the misplaced attempt to use the Constitution as a scapegoat for crime diverts attention and scarce resources from programs such as police training and penal reform which might, in fact, reduce crime. In the belief that the exclusionary rule

serves a critical educational and prophylactic role without posing a serious threat to the effective prosecution of crime and that its weakening would undermine constitutional liberty without alleviating our crime problem, amicus respectfully submits this brief amicus curiae.

ARGUMENT*

Two former members of this Court served as law enforcement officials for substantial periods of time prior to their respective appointments. Chief Justice Warren's service as an effective and energetic state prosecutor provided him with more first-hand experience in law enforcement than any Justice in the Nation's history. Justice Clark's service as Assistant Attorney General in charge of the

---

*Letters of consent to the filing of this brief amicus curiae have been granted by the parties in Colorado v. Quintero; United States v. Leon; and Massachusetts v. Sheppard and have been lodged with the Court

Criminal Division and as Attorney General provided him with valuable insight into the particular complexities of Federal law enforcement. Though each harbored initial skepticism concerning the exclusionary rule, Chief Justice Warren joined Justice Clark's opinion for the Court in Mapp v. Ohio, 367 U.S. 643 (1961) because both came to recognize that the exclusionary rule had not affected their ability to prosecute crime while serving as a critical reinforcement of Fourth Amendment values.

Justices Warren and Clark came to understand, in part through their experiences as prosecutors, the unique role played by the exclusionary rule in establishing respect for the Fourth Amendment within the law enforcement community. Similarly, as a modern day prosecutor, amicus has come to regard the exclusionary rule as a linchpin of enlightened

and effective law enforcement.

I. THE EXCLUSIONARY RULE DOES NOT ACT AS A SUBSTANTIAL IMPEDIMENT TO THE CONVICTION OF THE GUILTY

Of the 12, 474 cases prosecuted in Polk County, Iowa, between July 1980 - September 1983, only 24 cases, including 15 arrests for possession of controlled substances such as marijuana, were dismissed because of the exclusionary rule.

The success of Polk County law enforcement officials in providing effective law enforcement while complying with Fourth Amendment values is attributable, first, to the growth of a professionalized law enforcement

system in which police officers are trained to respect the Fourth Amendment while pursuing investigative techniques which deal effectively with crime; and, second, to the precision with which this Court has restated governing Fourth Amendment principles over the last 15 years. The recognition of a good faith exception to the exclusionary rule would jeopardize both factors.

Polk County's experience is reflected by recent studies of the impact of the exclusionary rule on law enforcement. Eg. W. LaFave, Search and Seizure, § 1.2., n.9. (1981 Supp.); Brosi, A Cross-City Comparison of Felony Case Processing, (INSLAW 1979). As law enforcement authorities have gained a greater understanding of their responsibilities under the Fourth Amendment -- in large part because of pressures generated by the exclusionary rule -- the incidence of Fourth Amendment

violation has steadily decreased until, today, it does not play a substantial role in the prosecution of crimes against persons or property. Thus, in Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 American Bar Foundation Research Journal, No 3 (forthcoming), 7,500 felony prosecutions in 9 mid-sized counties in Pennsylvania, Michigan and Illinois were studied. Nardulli reports that although motions to suppress were brought in approximately 5 percent of the cases, only 52 motions were granted, resulting in the loss of 40 cases -- or 0.6 percent of the felony prosecutions. Morever, the successful motions were concentrated in the narcotics possession area, leaving the prosecution of crimes against persons or property virtually untouched by the exclusionary rule. Finally, of the few defendants freed because of the

rule's operation, Nardulli points out that fully two-thirds, if convicted, would have received sentences of less than two months, while only one could have expected a sentence of more than one year. See also, Davies, What We Know (And Still Need to Learn) About the Costs of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research, 1983 American Bar Foundation Research Journal, No. 3 (forthcoming). Thus, the Nardulli study merely confirms the experience of amicus in Polk County that careful training and good police work have combined to render it possible to have both effective law enforcement and strict compliance with Fourth Amendment norms. Such a degree of police professionalism was not, however, attained without cost and substantial effort. In the experience of amicus,

the existence of the exclusionary rule has acted as the principal encouragement of police training and professionalization. The realization that untrained police would produce arrests which would not stand up to a motion to suppress has led to a quantum upsurge in effective police training. Were the Court to recognize a good faith exception, the cost/benefit analysis of all police training programs would be re-cast. Indeed, such a rule might place a premium on police ignorance -- so long as it were "reasonable" ignorance. The net result would be an inevitable decline in police training and a consequent loss in productivity.

While increased training has played an important role in the decline of Fourth Amendment violations, this Court's success in articulating bright-line common sense norms

governing search and seizure has allowed both police and prosecutors to gauge with increasing certainty their Fourth Amendment obligations and to engage in effective law enforcement free from unduly technical constraints. Thus, by simplifying the area of the Fourth Amendment over a fifteen year period, the Court has expanded the range of clearly permissible activity and drastically reduced the need for a good faith exception. For example, in Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York 392 U.S. 40 (1968), street stops and defensive frisks were upheld on less than probable cause; in Schneckloth v. Bustamonte, 412 U. S. 218 (1973) an expansive definition of consent searches was adopted; in United States v. Robinson, 414 U.S. 218 (1973) and Gustafson v. Florida, 414 U.S. 260 (1973), broad power to search incident to

a lawful arrest was recognized; in South Dakota v. Opperman, 428 U.S. 364 (1976), and United States v. Ross, 102 S. Ct. 2157 (1982) inventory searches of the contents of automobiles were broadly authorized; in United States v. Miller, 425 U.S. 438 (1976) and Smith v. Maryland, 442 U.S. 735 (1979) broad areas of investigative searches were removed from Fourth Amendment scrutiny; in Rakas v. Illinois, 439 U.S. 128 (1978), United States v. Salvucci, 448 U.S. 83 (1980) and Rawlings v. Kentucky, 448 U.S. 98 (1980), standing to assert 4th Amendment violations was dramatically narrowed; and in United States v. Calandra, 414 U.S. 338 (1973) , the Grand Jury process was exempted from the exclusionary rule. Most significantly, in Hill v. California, 401 U.S. 797 (1971) and Franks v. Delaware, 438 U.S. 154 (1978), the Court stressed that

understandable factual errors do not undercut a finding of probable cause. Finally, in Illinois v. Gates, __ U.S. __, 103 S.Ct. 2317 (1983), the Court permitted probable cause to be found on the basis of an anonymous informant's tip, so long as the "totality of the circumstances" gave rise to a "common sense determination that there is a fair probability of criminal activity." Such a flexible test, buttressed by the extremely generous reading given to law enforcement concerns by the Court during the last 15 years, makes the recognition of a good faith defense both unnecessary and potentially dangerous. Given the flexibility of the probable cause standard, the introduction of a good faith defense is merely an invitation to water down the probable cause standard, since the Court has already made it clear that reasonable mistakes of law or fact

do not preclude a finding of probable cause. Eg. Franks v. Delaware, 438 U.S. at 165. See also, United States v. Robinson, 414 U.S. 218 (1973); Draper v. United States, 358 U.S. 307 (1959). If a good faith exception is broader than the generous scope for mistake already inherent in the existing definition of probable cause, the concept of probable cause will be subject to a form of verbal reductionism which must rob it of any objective meaning. Thus, since the Fourth Amendment as construed by the Court does not interfere with effective law enforcement, and since the recognition of a good faith defense would dilute the substantive meaning of probable cause while removing much of the existing incentive for police training, amicus urges the Court to resist the invitation to create an unnecessary and expensive hole in the Fourth Amendment.

II. THE EXCLUSIONARY RULE IS NECESSARY TO EMPHASIZE THE SERIOUSNESS OF OUR SOCIETY'S COMMITMENT TO FOURTH AMENDMENT VALUES

Police officers receive conflicting signals from the community. On the one hand, they are subjected to enormous -- and understandable -- pressures to prevent crime and to apprehend criminals; on the other hand, they are sternly admonished to conform their official behavior to limits established by the Bill of Rights. As with any group receiving conflicting signals, a suspicion may exist that one signal is to be ignored in the pursuit of the other. In the years prior to Mapp, the routine acceptance and use by many state courts of evidence gathered in violation of the Bill of Rights fostered the impression among segments of the law enforcement community that only lip service need be paid to the

restraining signals emanating from the Bill of Rights. The announcement by the Court in Mapp that the Fourth Amendment must be taken seriously was, thus, more than the mere establishment of a deterrent; it was a reinforcement and amplification of the signal that law enforcement in a free society is more complex than merely capturing the guilty. It was a firm admonition that even a worthy law enforcement end cannot justify an unconstitutional means. In the twenty-three years since Mapp, a generation of police officers has come to maturity in America, trained to recognize both sets of signals as meriting serious attention. It would constitute a law enforcement tragedy of the highest proportions if this Court were to weaken the signals which flow from the Bill of Rights when we are so close to achieving a professionalized law enforcement community.

This Court should harbor no illusions as to the psychological impact of a retreat from Mapp, whether couched in the rubric of good faith or some other protective wrapping. The signal to the law enforcement community, whether or not intended, would be a palpable one -- we no longer take Fourth Amendment as seriously. The inevitable result of such a signal must be a quantum upsurge in conduct violative of the Fourth Amendment. Amicus earnestly urges the Court not to send such a signal in the absence of persuasive evidence that the exclusionary rule as currently administered in fact constitutes a substantial impediment to the prosecution of crime.

III. RECOGNITION OF A GOOD FAITH DEFENSE TO THE EXCLUSIONARY RULE WOULD INTRODUCE UNNECESSARY COMPLEXITY INTO THE CRIMINAL PROCESS AND WOULD ENCOURAGE POLICE TO REMAIN IGNORANT OF EVOLVING FOURTH AMENDMENT DOCTRINE

A. The Good Faith Defense is Administratively Unworkable

As this Court has seen, the administration of a good faith defense is both time consuming and necessarily inexact. Thus, in grappling with the problems posed by a good faith defense to an action for damages for the violation of constitutional rights, this Court has been forced to consider, inter alia, allocation of the production and persuasion burdens, definition of the substantive standard, the probative force of relevant evidence and the possibility of derivative liability.

Even more difficult issues will be posed in the context of a suppression hearing where the central issue will become, not the substantive meaning of the Fourth Amendment, but the objective good faith of

the officer. As the Solicitor General correctly notes, it is, occasionally, a difficult task to determine what the Fourth Amendment requires, despite the matrix of precedent in which a case is embedded. It would, however, be far more difficult -- indeed it would be impossible -- to venture into wholly uncharted waters and explore the objective good faith of the officer. Every suppression hearing would necessarily become an inquiry into the training and knowledge of the arresting officer, to say nothing of the extent to which he had committed prior violations of the Fourth Amendment. The results would be wholly unpredictable and would require an extraordinary investment in time and resources.

B. The Good Faith Defense Places a Premium on Ignorance

Under current standards, when this Court announces a clarification of Fourth Amendment doctrine -- for example, the decision in Delaware v. Prouse, 440 U.S. 648 (1979), clarifying the extent to which searches of automobiles could take place -- police officers possess a powerful incentive to understand the clarified rule in order to assure that their investigative practices do not violate the Fourth Amendment. Not surprisingly, therefore, the existence of the exclusionary rule has stimulated an extraordinary attempt by police officers to master Fourth Amendment doctrine. If, however, illegally seized evidence is admissible so long as the officer acted in good faith, police officials might well be better served by ignoring the

complexities of Fourth Amendment doctrine, trusting instead in their good faith to validate their investigative methods. Thus, if in the wake of Delaware v. Prouse, a police department studiously ignored the implications of the opinion, a police officer conducting a search in violation of that case might nevertheless be acting in good faith because he had never been informed of the case. While the notion of objective reasonableness places limits on willful ignorance, a good faith defense would place a premium on providing as little training as possible to satisfy minimum objective standards. Any additional training would be correctly perceived as creating unnecessary problems for the police. See Kaplan, The Limits of the Exclusionary Rule, 26 Stan L. Rev. 1027, 1044 (1971). See also, American Law Institute, 48th Annual Meeting, pp 374-98 (1971).

CONCLUSION

For the above-stated reasons, this Court should reject the suggestion that illegally seized evidence may be admitted so long as it was seized in good faith.

Respectfully submitted

DAN JOHNSTON
Counsel of Record
Polk County Attorney
5th and Mulberry
Des Moines, Iowa 50309

November 7, 1983
Des Moines, Iowa

Office-Supreme Court, U.S.
FILED
SEP 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-963

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

THE PEOPLE OF THE COMMONWEALTH
OF MASSACHUSETTS,
Petitioner,

VS.

OSBORNE SHEPPARD,
Respondent.

ON PETITION FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF LAWS AT WORK (L.A.W.) AS AMICUS CURIAE IN SUPPORT OF PETITIONER JOINED BY THE STATES OF ALABAMA, KENTUCKY, MISSOURI AND NEBRASKA

G. JOSEPH BERTAIN, JR., ESQ.
Vice-President, L.A.W.
San Francisco, California
LLOYD DUNN, ESQ.
Vice-President, L.A.W.
DONALD E. SANTARELLI, ESQ.
National Advisory Council, L.A.W.
Washington, D.C.
ROBERT L. TOMS, ESQ.
Vice-President, L.A.W.
Los Angeles, California
HAROLD S. VORCHELIN
Vice-President, L.A.W.
Los Angeles, California

Counsel for Amicus Curiae
ROBERT F. KANE,
Attorney at Law
1125 Marshall Street
Redwood City, CA 94063
(415) 364-8200

THE HONORABLE
GEORGE DEUKMEJIAN
Governor of the State of California
THE HONORABLE
JOHN JAY DOUGLASS
Dean, National College of District Attorneys
National Advisory Council, L.A.W.

DARBY OF SAN FRANCISCO, INC. • 950 NORTH ST. • S.F., CA 94133 • (415) 986-4300

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of Amicus Curiae	1
Statement of the Case	3
Summary of Argument	4
Argument	5
The Exclusionary Rule does not compel the suppression of evidence seized pursuant to a technically deficient warrant issued upon probable cause and executed in good faith	5
A. The Exclusionary Rule is not coextensive with the Fourth Amendment	5
B. Suppression serves no deterrent purpose	8
C. Suppression disserves the truthseeking function of the court	11
Conclusion	12

TABLE OF AUTHORITIES

Constitutional Provisions

Page

United States Constitution, Fourth Amendment 3, 5, 6, 11
California Constitution, Article I, Section 28(d) 7

Statutes

Ariz. Rev. Stats § 13-3925 (Crim. Code 1982) 7
Colo. Code of Crim. Proc. § 16-3-308 (1982) 7
Utah Code Crim. Proc. § 77-35-12(g) (1982) 7
Utah Jud. Code § 78-16-1 (1982) 7

Cases

Alderman v. United States, 394 U.S. 165 (1969) 6
Brown v. United States, 411 U.S. 223 (1973) 6
Illinois v. Gates, ... U.S. ....., 103 S.Ct. 2317 (1983)..
.....3, 8, 9, 12
Michigan v. DeFillippo, 443 U.S. 31 (1979) 6
Rakas v. Illinois, 439 U.S. 128 (1978) 6
Stone v. Powell, 428 U.S. 465 (1976) 5, 8, 11
United States v. Calandra, 414 U.S. 338 (1974) 5, 6
United States v. Ceccolini, 435 U.S. 268 (1978) 6
United States v. Havens, 446 U.S. 620 (1980) 6
United States v. Janis, 428 U.S. 433 (1976) 5, 6, 9
United States v. Peltier, 422 U.S. 531 (1977) 6
United States v. Williams, 622 F.2d 830 (5th Cir. 1980) 7
Walder v. United States, 347 U.S. 62 (1954) 6
Weeks v. United States, 232 U.S. 383 (1914) 5

Secondary Sources

Kaplan, The Limits of the Exclusionary Rule, 26 Stanford Law Review 1027 .....7, 11
Schroeder, Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, 69 Georgetown Law Journal 1361 (1981) 8, 10

No. 82-963

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

THE PEOPLE OF THE COMMONWEALTH
OF MASSACHUSETTS,
Petitioner,

VS.

OSBORNE SHEPPARD,
Respondent.

ON PETITION FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF LAWS AT WORK (L.A.W.) AS AMICUS CURIAE IN SUPPORT OF PETITIONER JOINED BY THE STATES OF ALABAMA, KENTUCKY, MISSOURI AND NEBRASKA

This brief *amicus curiae* is submitted pursuant to Supreme Court Rule 36, Petitioner's and Respondent's letters of consent thereto having been previously filed with the Clerk of the Court.

INTEREST OF AMICUS CURIAE

The signators to this brief share a common interest in the case at bar. Laws At Work is a non-profit corporation of citizens organized to foster the rights of both the law-abiding and the victims of crime. Toward that end, Laws At Work advocates the criminal justice system reform nec-

essary to insure that those rights are vindicated when threatened.

Laws At Work evolved from Citizens for Law Enforcement Needs founded for the above stated purpose by the late Don Belding, Doris Dolan and Dr. C. Erwin Piper in 1966.

For more than 16 years Doris Dolan has served as the volunteer director of state and national criminal justice projects incorporating active participation in all segments of the criminal justice system. In addition, its members have presented research upon request before governmental committees and fact-finding commissions, the latest being representative participation on the President's Task Force on Victims of Crime 1982-83.

The Attorneys General of the States of Alabama, Kentucky, Missouri and Nebraska are the chief law enforcement officers of their states, with oversight for the fair and effective enforcement of the laws therein.

In the light of those goals to which these signators are dedicated, amicus has studied with particular attention, and growing concern, the effect of the exclusionary rule upon the criminal justice system during the course of the rule's judicial expansion. So seemingly irrational has its application become within the context of an increasing number of cases, that amicus has added its voice to those of many others who urge the rule's reform:

> These developments, borne of years of experience with the exclusionary rule in operation, forcefully suggest that the exclusionary rule be more generally modified *to permit the introduction of evidence obtained in the*

reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.[1]

Perhaps no more egregious example of this irrationality, and no more compelling instance of this need for reform, can be cited than the case now before the Court, in which a first degree murder conviction was reversed solely because a warrant issued upon probable cause, *and executed in good faith*, was technically deficient.

Because this Court has reserved "for another day"[2] the question whether the exclusionary rule should be modified to prevent such instances of its untoward application, Laws At Work believes it should express its views by means of this brief *amicus curiae*, in the event that this should prove to be that other day.

STATEMENT OF THE CASE

The facts of this case are set forth in great detail in the Opinion of the Supreme Court of the Commonwealth of Massachusetts, which amicus assumes in turn comprises part of the Joint Appendix before the Court. In order that this brief *amicus curiae* not be prolix, amicus will refrain from repeating them *verbatim* herein.

Respondent's motion to suppress evidence having been denied by the trial court, he was subsequently tried and convicted of first degree murder. After that conviction was reversed by the Supreme Court of the Commonwealth of Massachusetts, the Commonwealth petitioned this Court for a Writ of Certiorari, which was granted on June 27, 1983.

---

[1] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2340 (1983) (WHITE, J., concurring) [Emphasis added].

[2] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2325 (1983).

SUMMARY OF ARGUMENT

The criminal justice goals of any democratic society are twofold: To ensure fairness to the accused, and to secure convictions of the guilty. The former is promoted by the deterrence of official misconduct, and the latter by a jury's impartial evaluation of probative evidence; both ends are complementary in their means.

Since its adoption, the exclusionary rule has represented a judicial remedy fashioned upon a deterrence rationale intended to promote the first of these two goals. Because it operates through the suppression of highly probative and inherently trustworthy evidence, however, the effect of the rule upon the criminal justice system is often to render its two aims mutually exclusive. Injudiciously imposed, the rule indeed frequently operates in derogation of the latter, wholly without regard to whether prejudice tainted the former.

Enlightened by the recognition that the exclusionary rule thus sacrifices one goal at the cost of the other, the decisions of this Court reflect a continuing effort to strike a more sensitive balance in its application. The occasion compelling another such effort arises when a technically deficient warrant is nonetheless issued upon probable cause and executed in good faith. In such cases, neither prejudice to the accused nor misconduct by the police exist as wrongs which can only be remedied by the suppression of relevant evidence; the truthseeking goal of criminal justice is disserved at great cost to no purpose. Amicus respectfully urges the Court to right this balance by ruling that the two goals of criminal justice are *not* mutually exclusive, and that an objective good-faith standard to the application of the exclusionary rule can fairly accommodate both.

ARGUMENT

THE EXCLUSIONARY RULE DOES NOT COMPEL THE SUPPRESSION OF EVIDENCE SEIZED PURSUANT TO A TECHNICALLY DEFICIENT WARRANT ISSUED UPON PROBABLE CAUSE AND EXECUTED IN GOOD FAITH

A. The Exclusionary Rule is Not Coextensive With the Fourth Amendment

No part of the Fourth Amendment itself, since *Weeks v. United States*[3] the exclusionary rule has been developed by this Court as a purely judicial remedy for violations of those substantive rights which the Fourth Amendment guarantees. As such, its function is to deter police misconduct,[4] upon the rationale that the cost of probative evidence lost is worth the price to ensure that police investigatory methods conform to Constitutional standards.

In recognition of the rule's judicial source and deterrence rationale, however, the Court has demonstrated that the rule is not coextensive with the Fourth Amendment itself, by taking care to ensure that its application is rationally "restricted to those areas where its remedial objectives are thought most efficaciously served."[5] The exclusionary rule thus "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons."[6] Such evidence has for example been held ad-

---

[3]232 U.S. 383 (1914).

[4]*Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

[5]*United States v. Calandra*, 414 U.S. 338, at 348 (1974).

[6]*Stone v. Powell*, 428 U.S. 465, at 486 (1976).

missible for purposes of impeachment;[7] over the objections of those without standing to assert the rule;[8] in federal civil proceedings following state officials' seizure;[9] despite a tainted source of derivative live testimony;[10] following an arrest based upon a subsequently invalidated statute or ordinance;[11] and for use in grand jury proceedings.[12]

In this latter context, the Court has made explicit its recognition of the need for a sensitive balance between the benefits and burdens implicit in the exclusion of probative evidence for the sake of deterrence:

> Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best . . . . We therefore decline to embrace a rule that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[13]

It is moreover necessarily the proper office of this Court to maintain the integrity of that balance, as it is nowhere struck by the Fourth Amendment itself:

> [T]he exclusionary rule is merely one arbitrary point on a continuum between deterrence of illegal police

---

[7] *United States v. Havens*, 446 U.S. 620 (1980); *Walder v. United States*, 347 U.S. 62 (1954).

[8] *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *Rakas v. Illinois*, 439 U.S. 128 (1978).

[9] *United States v. Janis*, 428 U.S. 433 (1976).

[10] *United States v. Ceccolini*, 435 U.S. 268 (1978).

[11] *United States v. Peltier*, 422 U.S. 531 (1977); *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

[12] *United States v. Calandra*, 414 U.S. 338 (1974).

[13] *Id.*, at 351-2. [Footnote omitted].

> activity and conviction of guilty persons. As a stopping point, it can be justified solely on the ground that it achieves a better balance between these twin goals than would other points. *If another stopping point does the job better, it should replace the current exclusionary rule.*
>
> This type of "quasi-constitutional" law is not unique to the Fourth Amendment area. The Supreme Court recognized in *Miranda* that the prohibitions it had layed down would stand unless and until an equally good method of protecting the constitutional values in question was developed. *In other words, the rule is not written into the Constitution.* Rather, the Constitution demands something that works—presumably at a reasonable social cost. The content of the particular remedial or prophylactic rule is thus a pragmatic decision rather than a Constitutional fiat.[14]

When, as in the case now before the Court, the indiscriminate application of the exclusionary rule imposes its burdens without yielding a concomitant deterrent benefit, a grave injustice is done which is constitutionally unnecessary and therefore corrigible.

---

[14]Kaplan, *The Limits of the Exclusionary Rule*, 26 Stanford Law Review 1027, at 1030 [Footnote omitted; emphasis added] *See also, United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), *cert. den.* 449 U.S. 1127 (1981); Ariz. Rev. Stats. § 13-3925 (Crim. Code 1982); Colo. Code Crim. Proc. § 15-3-308 (1982); *and* Utah Code § 77-35-12(g) (Code Crim. Proc. 1982) and § 78-16-1 (Jud. Code 1982). The California Constitution was amended on June 8, 1982 by the addition of Article I, Section 28(d), which effectively removed pre-existing Constitutional, statutory and decisional bases for excluding relevant evidence in criminal trials. Because such exclusion is now confined to federal Constitutional grounds, this Court's adoption of a good-faith standard would be binding upon the State of California.

B. Suppression Serves No Deterrent Purpose

Assuming[15] deterrence of police misconduct to be the primary benefit in the exclusionary rule balance, various commentators and members of this Court have nonetheless rightly observed that no such benefit attends the suppression of evidence seized pursuant to a warrant which is technically deficient, but obtained and executed in objective good faith. The police have conformed in such a case in every respect to the goals which the Fourth Amendment seeks to achieve, and suppression at trial becomes little more than a rule in search of a rationale:

> When officers have dutifully obtained a search warrant from a judge or magistrate, and execute the warrant as directed by its terms, exclusion of the evidence thus obtained cannot be expected to deter future reliance on such warrants. The warrant is prima-facie proof that the officers acted reasonably in conducting the search or seizure; "once the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."[16]

Moreover in practical effect, the chronic application of the exclusionary rule in such cases may serve to undermine the Fourth Amendment preference that seaches be conducted pursuant to warrants:

---

[15]The deterrent effect of the exclusionary rule has yet to be empirically established. *See generally, United States v. Janis*, 428 U.S. 433, 449-453 (1976).

[16]*Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2345 (1983) (WHITE, J. concurring), *quoting Stone v. Powell*, 428 U.S. 465, at 498 (1976) (BURGER, C.J., concurring). *See also*, Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Georgetown Law Journal 1361, at 1419 (1981).

> Excluding evidence for these reasons can have no possible deterrent effect on future police conduct, unless it is to make officers less willing to do their duty. Indeed, applying the exclusionary rule to warrant searches may well reduce incentives for police to utilize the preferred warrant procedure when a warrantless search may be permissible under one of the established exceptions to the warrant requirement.[17]

Nor, assuming its continuing viability, does the "judicial integrity" rationale suffice to compensate for what deterrent benefit the rule lacks in such circumstances:

> The primary meaning of "judicial integrity" in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the Court.[18]

In the case before the Court, no deterrent benefit justifies applying the exclusionary rule. The conduct of the police was entirely proper: Their investigation having established probable cause to arrest Osborne Sheppard for the murder of Sandra Boulware, they consulted with the district and assistant district attorneys in preparing an affidavit which meticulously established probable cause for both the arrest and search warrants. With no suitable search warrant form available on Sunday afternoon, the detective in charge made what he believed were the appropriate amendments to a controlled substances warrant, and submitted it to a

---

[17] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2345 (1983) (WHITE, J., concurring) [Citations omitted].

[18] *United States v. Janis*, 428 U.S. 423, at 458, note 35 (1976).

judge. The judge interlineated some additional changes before signing it, and the police proceeded to execute the warrant with the probable cause affidavit in their possession throughout the search, *in the good faith belief that the accompanying warrant was valid.* The search did not exceed the parameters of the warrant they believed they had obtained, and respondent suffered no prejudice: "The search was conducted in the same way and with the same results as it would have been conducted if the warrant had not been defective."[19] Such being the case, the exclusionary rule serves no deterrent purpose:

> When the police have dutifully applied to a judge or a magistrate for a search warrant, and have executed the warrant in strict conformity with its terms, exclusion of the evidence thus obtained can have no possible deterrent effect on future police conduct. Of course, exclusion of the evidence might improve the decisions of those magistrates who issue warrants pro forma or who lack the ability to evaluate intelligently the evidence before them. Even conscientious and well-trained magistrates occasionally make mistakes, however, and in such cases exclusion has absolutely no deterrent value. Thus, it makes sense to retain the exclusionary rule only for warrantless searches and those searches made on the authority of warrants based on perjured testimony or on evidence so scant that no reasonable magistrate could have believed it. This would encourage bona fide resort to warrants while also protecting individuals against abuse of warrant procedures.[20]

---

[19]Opinion of the Supreme Court of the Commonwealth of Massachusetts, at 23. [Footnote omitted].

[20]Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule, supra,* at 1419.

Suppressing of evidence seized in such circumstances, based upon a technical Fourth Amendment violation attributable to purely judicial error, is neither a necessary nor desirable application of the exclusionary rule. Even were its relative burdens de minimus, in the complete absence of either misconduct by the police or prejudice to the defendant, the exclusionary rule thus imposed yields no deterrent benefit.

C. Suppression Disserves the Truthseeking Function of the Court

In the balance of benefits and burdens implicit in the application of the exclusionary rule, the burdens are often *not* de minimus. It has been pointed out, for example, that the disparity in particular cases between a minor police error and its attendant "windfall" to the accused deeply offends the public sense of proportionality in justice.[21] The rule exacts perhaps its heaviest toll in this regard when its effect is to free those who have already been convicted. To apply the exclusionary rule to the case before the Court may well have the effect of freeing the defendant.

The greatest burden imposed by the exclusionary rule, however, must surely be its cost in terms of probative evidence lost to the jury, whose truthseeking function can only be thereby disserved. In barring the admission of relevant and inherently trustworthy evidence, the exclusionary rule is indeed wholly at odds with that function, and may in circumstances such as those at bar bear resemblance less to a remedy by which the goals of criminal justice are fostered, than to an obstacle by which they are frustrated.

---

[21] *Stone v. Powell*, 428 U.S. 465, at 490; *See also*, Kaplan, *The Limits of the Exclusionary Rule, supra*, at 1036.

Any remedy with such an effect "must bear a heavy burden of justification, and . . . be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness."[11] When, as in the case before the Court, such justification is utterly lacking, the limitations of the rule must be redefined, lest the truthseeking function of the courts founder upon a solicitude for the accused disproportionate to the errors of the State.

CONCLUSION

Amicus respectfully submits in light of the foregoing that the exclusionary rule does not compel the suppression of evidence seized pursuant to a technically deficient warrant issued upon probable cause and executed in good faith; suppression in such circumstances disserves both the deterrence rationale of the rule and the truthseeking function of the courts. The judgment of the Supreme Court of the Commonwealth of Massachusetts should be reversed with directions accordingly.

Dated: September 10, 1983

Respectfully submitted,

Counsel for Amicus Curiae
ROBERT F. KANE,
Attorney at Law
Vice-President, L.A.W.

---

[11] *Illinois v. Gates*, ... U.S. ...., at ...., 103 S.Ct. 2317, at 2342 (1983) (WHITE, J., concurring).

Laws At Work has been authorized by the Governor of the State of California, the Attorneys General of the following states and the Dean of the National College of District Attorneys to list them as joining in the brief *amicus curiae*.

Honorable George Deukmejian
Governor of the State of California
Honorable Charles A. Graddick
Attorney General of the State of Alabama
Honorable Steven L. Beshear
Attorney General of the State of Kentucky
Honorable John D. Ashcroft
Attorney General of the State of Missouri
Honorable Paul L. Douglas
Attorney General of the State of Nebraska
Honorable John Jay Douglass
Dean, National College of District Attorneys

82-963 82-1711 82-1771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-963

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

No. 82-1711

STATE OF COLORADO,

Petitioner,

vs.

FIDEL QUINTERO,

Respondent.

No. 82-1771

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERTO ANTONIO LEON,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE SUPREME COURT OF COLORADO, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

(Counsel Listed on Inside Cover)

Of Counsel:

HON. NEWMAN A. FLANAGAN
District Attorney
Boston, Massachusetts
Chairman, Board of Directors, National
District Attorneys Association, Inc.
New Court House Building
Pemberton Square
Boston, Massachusetts 02108

HON. ROBERT MILLER
District Attorney
Clark County, Nevada
President Elect,
National District Attorneys
Association, Inc.
200 S. 3rd Street
Las Vegas, Nevada 89155

HON. AUSTIN J. MCGUIGAN
Chief State's Attorney

HON. JOHN M. MASSAMENO
Assistant State's Attorney
Division of Criminal Justice
Office of the
Chief State's Attorney
P.O. Box 5000
Wallingford, Connecticut 06492

Attorneys for Amici:

HON. EDWIN L. MILLER, JR.
District Attorney
San Diego, California
President,
National District Attorneys
Association, Inc.
P.O. Box X1011
San Diego, California 92112

JACK E. YELVERTON, ESQ.
Executive Director
National District Attorneys
Association, Inc.
708 Pendleton Street
Alexandria, Virginia 22314

JAMES P. MANAK, ESQ.
Editor, Case Commentaries
and Briefs
National District Attorneys
Association, Inc.
33 N. LaSalle Street
Suite 2108
Chicago, Illinois 60602

Pandick Press Midwest, Inc., Chicago • 434-7600

QUESTION PRESENTED

Whether this Court should adopt an exception to the Fourth Amendment Exclusionary Rule that will permit the admissibility of evidence that would otherwise be suppressed, where law enforcement officers act in an objective good faith belief that their conduct is proper.

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Authorities	iii
Interest of Amicus	2
Statement	4
Summary of Argument	5
Argument	6
IF THIS COURT FINDS THAT THE EVIDENCE IN ANY OF THESE CASES WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, IT SHOULD ADOPT AND APPLY AN EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT WOULD PERMIT THE ADMISSIBILITY OF EVIDENCE WHERE LAW ENFORCEMENT OFFICERS HAVE ACTED IN AN OBJECTIVE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.	
Conclusion	12

TABLE OF AUTHORITIES

Cases

	PAGE
Colorado v. *Quintero*, 657 P. 2d 948 (Colo. 1983)..	4, 5
Commonwealth v. *Bradshaw*, 434 A. 2d 181 (1981).....	9
Commonwealth v. *Sheppard*, 441 N. E. 2d 725 (Mass. 1982).....	4, 5
Illinois v. *Gates*, ___ U. S. ___, 103 S. Ct. 2266 (1983).....	3, 5, 10
Mapp v. *Ohio*, 367 U. S. 643 (1961).....	5
Nix v. *State*, 621 P. 2d 1347 (Alas. 1981).....	8
People v. *Adams*, 53 N. Y. 2d 1, 442 N. E. 2d 537 (1981).....	9
Richmond v. *Commonwealth*, 28 K. L. S. 10, 29 CrL 2529 (Ky. App. 1981), *aff'd.*, 29 K. L. S. 10 (Ky. 1982).....	8
State v. *Lehnen*, 403 So. 2d 683 (La. 1981).....	8
United States v. *Ajlouny*, 629 F. 2d 830 (2d Cir. 1980).....	8
United States v. *Leon*, 701 F. 2d 187 (9th Cir. 1983).....	4, 5
United States v. *Williams*, 622 F. 2d 830 (5th Cir.), *cert. den.*, 101 S. Ct. 946 (1981).....	7, 8, 9
Weeks v. *United States*, 232 U. S. 383 (1914).....	5

Statutes and Other Legislative Material

A.R.S. 13-3925 (Ariz.).....	7
C.R.S. 1973, 16-3-308 (Colo.).....	4, 7
AELE Model State Statute on Exclusionary Rule Limitations: Admissibility of Evidence Obtained as a Result of an Unlawful Search or Seizure (1982).....	7

PAGE

Reports and Articles

Attorney General's Task Force on Violent Crime, 29 CrL 3131 (1981) 6, 9

Bosarge, *NIJ Study Finds Exclusionary Rule Has Major Negative Impact on Prosecuting Drug Cases*, 16 Crime Control Digest, No. 52, p. 1 (1982) 9

Miller, *The Exclusionary Rule and Its Alternatives*, 12 The Prosecutor 335 (1977) 7

National Prosecution Standards, National District Attorneys Association (1977) 6

Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives*, 15 The Prosecutor 348 (1981) 7, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-963

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

vs.

OSBORNE SHEPPARD,

Respondent.

No. 82-1711

STATE OF COLORADO,

Petitioner,

vs.

FIDEL QUINTERO,

Respondent.

No. 82-1771

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERTO ANTONIO LEON,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, THE SUPREME COURT OF COLORADO, AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Counsel for the various parties, and letters of consent of the parties have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., is a non-profit corporation and the sole national organization representing state and local prosecuting attorneys in America. Its programs of education, training, publications and *amicus curiae* activity carry out its guiding purpose since its founding in 1950 of reforming the criminal justice system for the benefit of all our citizens.

The prosecutors of this nation are fully conversant with the problems faced by state and federal law enforcement officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comply with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. It was noted by David L. Armstrong, Commonwealth Attorney, Louisville, Kentucky, former President of NDAA, in his testimony before the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982, on the federal Exclusionary Rule reform bills (S. 101, S. 751), that it is the *prosecutor* upon whom the heaviest burden of the Rule rests. The prosecutor must not only act as a guide for the police in tracing their way through this maze of rules, but must shoulder the responsibility for unsuccessful prosecution when a trial or appellate court suppresses vital and reliable evidence. Since the Rule also exacts a heavy price from Society by freeing guilty persons, continuation of the Rule in its absolute form can no longer be justified. As noted by Edwin L. Miller, Jr., District Attorney, San Diego, California, President of NDAA, in his testimony on May 11, 1983, before the Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on behalf of NDAA and in favor of the Exclusionary Rule reform provisions of then-pending S. 829:

> One of the more pernicious aspects of the Exclusionary Rule in its present form, is that it protects *only* the criminal and does nothing for the innocent citizen who is wrongly

stopped or searched by police. It is an ignoble judicial rule which gives 100% of its benefits—in every case at every time, with no exceptions—to criminals, at the expense of honest citizens.

Amicus argued for adoption of the good faith exception to the Exclusionary Rule in the case of *Illinois v. Gates*, ____ U. S. ____, 103 S. Ct. 2266 (1983) in the last Term of this Honorable Court. We understand the reasons why the Court chose not to reach the issue in that case. We believe that the issue is squarely and appropriately presented in all three of the cases now before this Court, and we respectfully resubmit the arguments that we asked the Court to consider in *Gates*.

STATEMENT

In its opinion in *Commonwealth* v. *Sheppard*, 441 N. E. 2d 725 (Mass. 1982), the court held that evidence seized under a warrant that, because of the good faith negligence of the issuing magistrate, failed to describe the items to be seized, had to be suppressed under the Fourth Amendment Exclusionary Rule. In doing so, the court based its decision squarely on the Fourth Amendment, noting, "... we need not consider whether the evidence should be suppressed pursuant to the laws of this Commonwealth. To this date this court has not adopted an exclusionary rule under the law of the Commonwealth to remedy a violation of a criminal defendant's art. 14 [of the Massachusetts Declaration of Rights] rights." 441 N. E. 2d at 736. Article 14 is the Commonwealth's equivalent of the Fourth Amendment.

In *Colorado* v. *Quintero*, 657 P. 2d 948 (Colo. 1983), the court held that the fact that the respondent was a stranger to a neighborhood, acted suspiciously, and was in possession of a television set that he tried to cover with his shirt, was insufficient to establish probable cause for his arrest in a situation where the police lacked evidence that a crime had been committed. The court declined to apply a Colorado statute adopted in 1981 (C.R.S. 1973, 16-3-308) which renders evidence admissible when seized as a result of a "good faith mistake", taking the position that the statute contemplated a misperception of an existing fact, whereas the case actually involved a mistaken judgment of law, and that the good faith exception had not been adopted by the U. S. Supreme Court. 657 P. 2d at 950-51.

Finally, in *United States* v. *Leon*, 701 F. 2d 187 (9th Cir. 1983), the court held that a federal trial judge properly suppressed evidence seized pursuant to a search warrant, issued by a state magistrate, on the ground that the affidavit in support of the warrant was inadequate. Although invited by the Government to recognize a good faith exception to the Ex-

clusionary Rule, the court stated, "[w]e have not heretofore recognized such an exception and we decline the invitation to recognize one at this juncture." Petition for Writ of Certiorari, *U. S.* v. *Leon*, 82-1771, Appendix A, p. 4. Nevertheless, the federal trial judge found that the law enforcement officers acted in good faith, and this finding was not disturbed by the Ninth Circuit Court of Appeals.

Thus, *amicus* submits that the issue of a good faith exception to the Exclusionary Rule is appropriately before this Court in these three cases—in warrantless as well as warrant settings, and that the Court can and should now address the question framed originally in its order of November 29, 1982, in *Illinois* v. *Gates*, *supra*, "... whether the rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Weeks* v. *United States*, 232 U. S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment."

SUMMARY OF ARGUMENT

Applying the Fourth Amendment Exclusionary Rule in cases where law enforcement officers have acted in objective good faith no longer serves the purposes for which the Rule was originally intended. We ask this Court to adopt a good faith exception to the Rule not only in cases where a search warrant has been issued by an impartial magistrate, as in *Commonwealth* v. *Sheppard*, *supra*, and *U. S.* v. *Leon*, *supra*, but also in *all* appropriate cases where the police have acted in the objective good faith belief that their conduct conformed to the requirements of the Fourth Amendment, as in the warrantless case of *Colorado* v. *Quintero*, *supra*.

ARGUMENT

IF THIS COURT FINDS THAT THE EVIDENCE IN ANY OF THESE CASES WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT, IT SHOULD ADOPT AND APPLY AN EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE THAT WOULD PERMIT THE ADMISSIBILITY OF EVIDENCE WHERE LAW ENFORCEMENT OFFICERS HAVE ACTED IN AN OBJECTIVE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

There is probably no better description of the Exclusionary Rule's basic defect, and the appropriate remedy for such defect, than the recommendation of the Attorney General's Task Force on Violent Crime in its Final Report of August 17, 1981:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the **reasonable, good faith belief** that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief.

Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981) (emphasis supplied).

Although *amicus* previously recommended outright abolition of the Rule, see National Prosecution Standards, Standard 19.11, and Commentary, *Exclusionary Rule*, p. 356, National District Attorneys Association (1977), we adopted the Attorney General's Task Force recommendations at our Board of Direc-

tors meeting on October 8, 1981, as a reasonable alternative that will effectively address the proper concerns of all participants in the criminal justice system. We do not believe, however, that this Court should limit the application of such an exception to warrant cases only, and we have supported legislation that would provide for a general good faith exception. Statement of David L. Armstrong, former President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on April 20, 1982; Statement of Edwin L. Miller, Jr., President, NDAA, before Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, on May 11, 1983. See also, Miller, *The Exclusionary Rule and Its Alternatives*, 12 The Prosecutor 335 (1977); Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives*, 15 The Prosecutor 348 (1981).

In this regard we believe that the Colorado good faith exception statute, C.R.S. 1973, 16-3-308 (1981), written by former Denver District Attorney Dale Tooley, and the similar Arizona state, A.R.S., 13-3925 (1982), serve as examples for the states because they test good faith by an objective standard, rather than simply by the subjective beliefs of a police officer that his conduct conforms to the Fourth Amendment. We note also the recent promulgation of a Model State Statute on Exclusionary Rule Limitations by Americans for Effective Law Enforcement, Inc. The Model Statute uses an objective standard, and we anticipate that it will be used by many states in drafting their statutes in this area.

Although statutory reform at the state and federal levels is highly desireable, caselaw development has been the primary vehicle for reform of the Exclusionary Rule, and we support this development. The seminal case in the adoption of the good faith exception by the courts is *United States* v. *Williams*, 622 F. 2d 830 (5th Cir.), *cert. den.*, 101 S. Ct. 946 (1981), where the Fifth Circuit Court of Appeals, sitting *en banc*, stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery,

> it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence.

622 F. 2d 830, 846-7.

In adopting this approach, the *Williams* Court noted that an officer's subjective belief concerning the legality of a search would not suffice. Ignorance of the basic principles of criminal procedure would not constitute good faith. The police officer's actions are subject to an objective test and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d at 847.

The *Williams* Court, we believe, put to rest the argument of the respondents that the Exclusionary Rule is needed to deter police misconduct: "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d at 842. The court stated that the Rule should apply only when that application can serve its originally intended purpose, i.e., deterrence. 622 F. 2d at 847.

The growing dissatisfaction with the absolute application of the Exclusionary Rule has prompted several other courts to recognize a good faith exception to the Rule. *See e.g., United States* v. *Ajlouny*, 629 F. 2d 830, 840-42 (2d Cir. 1980), *cert. den.*, 449 U. S. 1111 (1981) (good-faith mistake of law); *State* v. *Lehnen*, 403 So. 2d 683 (La. 1981) (mistake of fact); *Nix* v. *State*, 621 P. 2d 1347, 1349-50 (Alas. 1981) (consent to search; good-faith mistake of fact); *Richmond* v. *Commonwealth*,[1] 28

[1] The Supreme Court of Kentucky affirmed on other grounds at 29 K. L. S. 10 (Ky. 1982), taking the position that magistrates have statewide jurisdiction to issue search warrants under the Kentucky Constitution.

K. L. S. 10, 29 Cr L 2529 (Ky. App. 1981), *aff'd.*, 29 K. L. S. 10 (Ky. 1982) (mistake of law); *People* v. *Adams*, 53 N. Y. 2d 1, 442 N. E. 2d 537 (1981) (exigency; mistake of fact); *Commonwealth* v. *Bradshaw*, 434 A. 2d 181, 183 (Pa. 1981) (good-faith but mistaken belief in informant's information). In each of these cases, the courts have recognized that the original deterrance rationale for the rule—if it *ever* was valid—has been eroded to the point of non-existence, and these courts have wisely applied the principle that "[w]here the reason for the rule ceases, its application must cease also." *United States* v. *Williams*, 622 F. 2d at 840; *see*, Attorney General's Task Force on Violent Crime, *supra*, at 3134 (1981).

Whatever deterrence the Rule has achieved has, moreover, been obtained at high cost. As a study of the National Institute of Justice released on December 17, 1982, noted, one out of every three persons arrested in Los Angeles, California, on felony drug charges, was not brought to trial because the police committed errors in seizing evidence, and that approximately half of the defendants released in that State because of the Exclusionary Rule were arrested within two years for new offenses. Bosarge, *NIJ Study Finds Exclusionary Rule Has Major Negative Impact on Prosecuting Drug Cases*, 16 Crime Control Digest, No. 52, p. 1 (1982). *Amicus* submits that the statistics cited in the NIJ report amply justify concern with an application of the Rule that fails to recognize an exception for police officers acting in objective good faith. The main effect of the Rule seems not to have been the deterrence of police misconduct, but, rather, the deterrence of convictions of those who continue to prey upon our law-abiding citizens.

Perhaps no better statement of the pervasive discontent with the Rule because of its inherent inadequacy and ineffectiveness—as well as its intolerable excesses—exists than the statement by former Los Angeles, California, District Attorney, John K. Van de Kamp, now California Attorney General:

A review of the rule's application and development leads to the following conclusions:

• It has failed to live up to the expectations of those who framed it.

• Despite the dramatic improvement in police professionalism, the rule itself is of questionable effectiveness in deterring instances of improper police conduct.

• The statutory rules and case law governing search and seizure have become so complex and change so frequently that no law enforcement officer can be reasonably expected to know them in their entirety. This is also true of the rules governing arrest, confessions, line-ups and other areas of police procedure where the exclusionary rule comes into play.

• As a consequence of its implementation, truthful, reliable and probative evidence is kept from the trier of fact in criminal cases. As a result, guilty persons sometimes go free. On occasion, cases are so weakened by the loss of the excluded evidence that a conviction—if it can be obtained at all—can only be obtained on charges less substantial than those for which a defendant is guilty in fact.

Van de Kamp, *The Exclusionary Rule: Promises Not Kept—Proposed Alternatives,* 15 The Prosecutor 348 (1981).

We also join with Justice White in his concurring opinion in *Illinois v. Gates, supra,* in noting the futility of further pursurance of a mechanical application of the Rule; such a pursuit does not take into account the realities of present day law enforcement and the societal costs of applying the Rule. ___U. S. ___, ___, 103 S. Ct. 2317, 2342-2344.

Amicus believes that to apply the Exclusionary Rule in cases such as the instant cases, where law enforcement officers have acted in objective good faith, serves no good purpose whatsoever. It is, indeed, time for a change, as the many *amici* supporting the petitioners in these cases have urged. Although prosecutors have been in the vanguard of state and federal

legislative and judicial reform of the Rule, we must look to the United States Supreme Court for a final answer to this issue. The prosecutors of this nation know that this Honorable Court will give this matter—which is probably the most important criminal justice issue of the 20th Century—careful and balanced consideration.

CONCLUSION

Amicus respectfully submits that the Exclusionary Rule should not be applied in these cases. They present a timely and appropriate opportunity for the Court to adopt an objective good faith exception to the Exclusionary Rule. We ask that the decisions of the Supreme Judicial Court of Massachusetts, the Supreme Court of Colorado, and the Ninth Circuit Court of Appeals, be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

Of Counsel:

HON. NEWMAN A. FLANAGAN
District Attorney
Boston, Massachusetts
Chairman, Board of Directors, National District Attorneys Association, Inc.
New Court House Building
Pemberton Square
Boston, Massachusetts 02108

HON. ROBERT MILLER
District Attorney
Clark County, Nevada
President Elect,
National District Attorneys Association, Inc.
200 S. 3rd Street
Las Vegas, Nevada 89155

HON. AUSTIN J. MCGUIGAN
Chief State's Attorney

HON. JOHN M. MASSAMENO
Assistant State's Attorney
Division of Criminal Justice
Office of the Chief State's Attorney
P.O. Box 5000
Wallingford, Connecticut 06492

Attorneys for Amici:

HON. EDWIN L. MILLER, JR.
District Attorney
San Diego, California
President,
National District Attorneys Association, Inc.
P.O. Box X1011
San Diego, California 92112

JACK E. YELVERTON, ESQ.
Executive Director
National District Attorneys Association, Inc.
708 Pendleton Street
Alexandria, Virginia 22314

JAMES P. MANAK, ESQ.
Editor, Case Commentaries and Briefs
National District Attorneys Association, Inc.
33 N. LaSalle Street
Suite 2108
Chicago, Illinois 60602

Nos. 82-1771, 82-963 and 82-1711

Office - Supreme Court, U.S.
FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner*,

vs.

ALBERTO ANTONIO LEON, et al.

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,

vs.

OSBORNE SHEPPARD.

STATE OF COLORADO, *Petitioner*,

vs.

FIDEL QUINTERO.

On Writs Of Certiorari To The United States Court Of Appeals
For The Ninth Circuit,
The Supreme Judicial Court Of Massachusetts,
And The Supreme Court Of Colorado

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, STATE PUBLIC DEFENDER OF CALIFORNIA

Amici Curiae In Support Of Respondents

MARSHALL W. KRAUSE
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Wood Island, Suite 207
60 E. Sir Francis Drake Boulevard
Larkspur, California 94939
Telephone: (415) 461-4100
QUIN DENVIR, STATE PUBLIC DEFENDER
STEPHAN B. IRWINE, DEPUTY
107 South Broadway
Los Angeles, California 90012
CHARLES SEVILLA
1390 Market Street
San Francisco, California 94102

QUESTIONS PRESENTED

1. In No. 82-1771, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reliance on a search warrant subsequently held to be defective for lack of probable cause.

2. In No. 82-963, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reliance on a search warrant supported by probable cause but defective for failure to specify the items to be seized.

3. In No. 82-1711, the question presented is whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in the erroneous belief that the warrantless arrest of a burglary suspect was made on probable cause.

TABLE OF CONTENTS

	Page
Questions presented	i
Interest of amici curiae	1
Summary of argument	1
Argument	3
I	
The exclusionary rule encourages lawful police conduct	3
A. Cost-benefit analysis is not an appropriate tool to limit constitutional freedoms	3
B. Common sense tells us that the exclusionary rule encourages compliance with the fourth amendment	5
C. Empirical data on the effect of the exclusionary rule is consistent with the assumption that the rule encourages compliance with constitutional standards	7
D. The exclusionary rule is seldom implicated in the release of persons charged with crimes, particularly crimes of violence	10
1. Relatively few criminal defendants go free because of the exclusionary rule	11
2. The exclusionary rule has virtually no effect on the successful prosecution of violent crimes	12
E. This court's assumption that the exclusionary rule encourages compliance with the fourth amendment is well founded	14
II	
No major exception to the exclusionary rule should be adopted without considering all the values the rule protects	15

TABLE OF CONTENTS

Page

III

The proposed reasonable mistake exception would encourage fourth amendment violations, be difficult and complex to apply and would freeze development of fourth amendment law 18

A. The proposed "reasonable mistake" exception will encourage police to obtain warrants from rubber stamp magistrates and thus increase the number of unlawful searches undertaken for exploratory purposes on less than probable cause .. 18

B. The proposed exception will introduce a two-step analysis into every search and seizure hearing, confuse the area of fourth amendment law with a dual test and make it difficult to know what standards to apply in assessing the admissibility of evidence obtained in violation of the fourth amendment 22

C. The "reasonable mistake" exception would freeze development of fourth amendment law by removing a defendant's incentive to challenge arguable cases 24

IV

A warrant issued on a showing which does not amount to probable cause is not a constitutional warrant 26

A. The history of the warrant clause of the fourth amendment cautions against adoption of exceptions to the probable cause requirement 26

B. The preference given to warrants is a sufficient "reward" for the good faith of the police in seeking judicial authorization for their actions .. 27

C. No feasible alternative to exclusion exists where there is a warrant 28

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases

	Page
Bivens v. Six Unknown Agents, 403 U.S. 388 (1971)	5
Blackburn v. Alabama (1960) 361 U.S. 199	15
Boyd v. United States, 116 U.S. 616 (1886)	5
Elkins v. United States, 364 U.S. 206 (1960)	5
Escobedo v. Illinois (1964) 378 U.S. 478	16
Illinois v. Gates, ... U.S. ....., 76 L.Ed.2d 527 (1983)	13
Jones v. United States, 362 U.S. 257 (1960)	27
Kolender v. Lawson, ... U.S. ....., 75 L.Ed.2d 903 (1983)	14
Mapp v. Ohio, 367 U.S. 543 (1961)	5, 8, 9, 10, 17
Olmstead v. United States, 227 U.S. 438 (1928)	17
Oregon v. Bradshaw, ... U.S. ....., 77 L.Ed.2d 405, 103 S.Ct. 2830 (1983)	23, 24
People v. Cahan, 44 Cal.2d 434 (1955)	6
Rogers v. Richmond (1961) 365 U.S. 534	16
Steagald v. United States (1981) 451 U.S. 204	24, 25
Stone v. Powell, 428 U.S. 465 (1976)	10, 15
Terry v. Ohio (1968) 392 U.S. 1	17
United States v. Calandra (1974) 414 U.S. 338	16
United States v. Cravero, 545 F.2d 406 (1976)	25
United States v. Havens (1980) 446 U.S. 620	16
United States v. Payner (1980) 447 U.S. 727 (n. 8), 738	17
United States v. Ross, 456 U.S. 798	23
United States v. Ventresca, 380 U.S. 102 (1965)	27
Weeks v. United States, 232 U.S. 383	5, 17

Constitution

United States Constitution:

Fourth Amendment ..... passim

Fifth Amendment 25

TABLE OF AUTHORITIES CITED

Other Authorities

Page

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L.Rev. 349 (1974) 6, 26

Annual Report, Judicial Counsel of California (1983) pp. 11-12 12

Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 Journal of Criminal Law & Criminology 635 (1978) 26

Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention, 23 So.Tex. L.J. 558 (1982) 5, 6, 9, 10, 11, 12, 13, 14

Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Ky. L.J. 681 (1974) 7, 8, 9, 12

Canon, Testing the Effectiveness of Civil Liberties Policies at the State and Federal Level: The Case of the Exclusionary Rule, 15 Am.Pol.Q. 57 (1977) 9

Canon, The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police? 62 Judicature 398 (1979) 9, 10

Critique, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 N.W.U. L.Rev. 740 (1974) 9, 12

Davies, Do Criminal Due Process Principles Make A Difference?, Am.Bar Foundation Res. J. 247 12

Fyfe, Enforcement Workshop, The NIJ Study of the Exclusionary Rule, ... Crim. L.Bull. 253 (1983) 11, 12, 14

Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L.Bull. 5 (1979) 29

Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L.Rev. 1027 (1974) 12

TABLE OF AUTHORITIES CITED

OTHER AUTHORITIES

Page

Kelman, Cost-Benefit Analysis: An Ethical Critique, Regulations, (American Enterprise Journal on Government and Society) 33 (Jan./Feb., 1981) 3

La Fave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 Univ. Pittsburgh L. Rev. 307 (1982) 21

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665 (1970) 5

Report by the Comptroller General of the United States (GAO): Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979) 11, 12

Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. Legal Studies 243 (1973) 8

Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases, 83 Col. L.Rev. 1365 (1983) 17, 19, 20, 23, 26

Sugden and Williams, The Principles of Practical Cost-Benefit Analysis, Oxford University Press (1978) 4

The Effect of the Exclusionary Rule: A Study in California, Criminal Justice Research Report (1982)..... 11

Tiffany, McIntyre & Rotenberg, Detection of Crime, 120 (1967) 19

Wilkey, Constitutional Alternative to the Exclusionary Rule, 23 So.Tex.L.J. 590 (1982) 10

Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214 (1978) 10, 21

Wright, Must the Criminal Go Free if the Constable Blunders, 50 Tex. L.Rev. 736, at 739-740) 6, 12

Nos. 82-1771, 82-963 and 82-1711

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, *Petitioner,*

VS.

ALBERTO ANTONIO LEON, et al.

COMMONWEALTH OF MASSACHUSETTS, *Petitioner,*

VS.

OSBORNE SHEPPARD.

STATE OF COLORADO, *Petitioner,*

VS.

FIDEL QUINTERO.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit, The Supreme Judicial Court Of Massachusetts, And The Supreme Court Of Colorado

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, STATE PUBLIC DEFENDER OF CALIFORNIA Amici Curiae In Support Of Respondents

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers was founded 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, to promote the proper administration of criminal justice and to encourage the integrity, independence and expertise of the defense lawyer. It has more than 3,000 members.

California Attorneys for Criminal Justice is an organization of over 1,800 California lawyers engaging in the defense of criminal cases. It has an active educational program for the defense bar. It has a heightened interest in the federal interpretation of the Fourth Amendment with the recent passage of a California constitutional amendment possibly limiting the use of the California Constitution as an independent ground for the exclusion of illegally seized evidence in California courts.

The State Public Defender of California has the major responsibility for representation of indigent criminal defendants on appeal in that state. The office also provides advice and research materials to county public defenders and private attorneys engaged in criminal appellate practice in California.

The parties have given their consent to the filing of this *amici curiae* brief; the letters of consent are on file.

Amici are criminal defense lawyers who spend the major portions of their professional lives defending persons accused of crimes. We rise to the defense of the exclusionary rule of the Fourth Amendment because it demonstrates and makes effective the principle that no one in these United States is above the law. Judicial approval of the lawless enforcement of law would undercut that principle.

SUMMARY OF ARGUMENT

This brief follows four main arguments in urging that a "reasonable mistake" exception to the exclusionary rule

of the Fourth Amendment not be adopted by this Court for warrantless searches or for searches seemingly authorized by judicial warrant.

1. The price for application of the exclusionary rule is not too dear because the rule works to encourage the best in our police and magistrates at a relatively modest cost, considering the interests at stake. A cost-benefit analysis in this field is inappropriate, inexact and insufficient to justify the untoward results which would follow adoption of a major exception to the exclusionary rule. The available empirical data indicates that the exclusionary rule does effectively deter unlawful conduct and is responsible for fewer acquittals, especially when the defendant is charged with a violent crime, than is generally supposed.

2. In addition to the deterrence of unlawful conduct by the police, the current exclusionary rule encourages careful police work and careful decisions by magistrates, upholds the principle that significant government misconduct is a sufficient reason for dismissal of criminal proceedings transcending the question of the guilt or innocence of an individual defendant, is necessary if constitutional rights are to be perceived by the public as a reality and not hypocrisy, and refuses to allow the courts to commit an affront to the Constitution by allowing illegal actions to improve the government's power.

3. The proposed exception would increase the scope and number of *unconstitutional* searches of private persons, places and effects by rewarding rubber stamp magistrates and rewarding police resort to such magistrates. The proposed exception would also create a standardless, complex, two-step analysis for most Fourth Amendment issues which would be difficult to mold by precedent in the usual common law manner. Lastly, it appears that the exception, if adopted, would freeze current Fourth Amendment law in place as there would be no incentive for a defendant to challenge any police action which could be "reasonable" even if in violation of constitutional rights.

4. Application of the proposed exception to validate invalid warrants flies in the face of the wording of the Fourth Amendment, could allow general warrants and is unnecessary in view of the presumption given to the validity of warrants under current law.

ARGUMENT

I

THE EXCLUSIONARY RULE ENCOURAGES LAWFUL POLICE CONDUCT

A. Cost-Benefit Analysis Is Not an Appropriate Tool to Limit Constitutional Freedoms

As the cornerstone of his argument that a "reasonable mistake" exception should be adopted by this Court, the Solicitor General relies on the premise that the exclusionary rules comes up short after a cost-benefit analysis. (Brief for the United States, pp. 34-77). *Amici* believe that to the extent such an analysis is possible it demonstrates that the benefits of deterring violations of citizens' Fourth Amendment rights clearly outweigh the demonstrable "costs" of enforcing the rule. However, before that analysis is undertaken we respectfully suggest that this Court consider whether a cost-benefit analysis is the appropriate tool for analyzing policy decisions which affect our fundamental freedoms. At least one commentator, Professor Steven Kelman, has argued that it is not. He points out that, "We do not do cost-benefit analyses of freedom of speech or trial by jury."[1]

A cost-benefit analysis is inappropriate to those values embedded in our Bill of Rights precisely because they are "priceless" and have a moral force that transcends economic considerations. But putting any philosophical objections aside, there are difficult practical problems to applying a cost-benefit analysis to the Fourth Amendment's exclusionary rule. A cost-benefit analysis requires that the

[1]Kelman, *Cost-Benefit Analysis: An Ethical Critique*, Regulations, (American Enterprise Journal on Government and Society) 33, 35-36 (Jan./Feb., 1981).

benefits (in this case the deterrence of unlawful searches) and the costs (a guilty criminal defendant having an increased chance of going free) be assigned some relative "monetary" value.[2] Does an unlawful search outweigh a fortuitously freed but guilty defendant, or vice versa? If one outweighs the other then by what factor—a factor of two or a factor of ten? Does it depend on the seriousness of the unlawful search, or the crime which the defendant was charged with, or some other factors? These are hard questions, none of which are addressed in the Solicitor General's brief.

What surely must be conceded by the Solicitor General is that the precise number of unlawful searches deterred, and the precise number of criminal defendants who have been, or will be set free by the exclusionary rule is unknown and unknowable. To further complicate matters, there is no way of calculating how many of the cases not resulting in convictions solely because of search problems would be affected by the proposed "reasonable mistake" exception. Nor can one determine to what extent such an exception would affect the number of illegal searches presently deterred. Thus even if this Court could overcome the difficult task of assigning a relative value to the perceived costs and benefits of the exclusionary rule it is impossible to supply the multiplying factor necessary to complete the equation. As a result the Solicitor General's conclusion that the costs of the exclusionary rule in "reasonable mistake" situations outweigh the benefits, rather than being a scientific calculation, is no more than a subjective judgment.

---

[2]Sugden and Williams, *The Principles of Practical Cost-Benefit Analysis*, Oxford University Press (1978). Of course, deterrence is not the only benefit of the exclusionary rule. See *infra*, Part II. Nor do all defendants who are in fact guilty of the crimes charged go free after the exclusionary rule results in the suppression of some of the evidence against them. Some are convicted on the remaining evidence. See note 29, *infra*.

B. Common Sense Tells Us That the Exclusionary Rule Encourages Compliance With the Fourth Amendment

It has been argued that at present the primary justification for the exclusionary rule is that it deters the police from violating the Fourth Amendment rights of our citizens to be free from unreasonable searches and seizures. Expanding on this thesis, critics of the exclusionary rule assert that since empirical data fails to conclusively establish a deterrent effect, the major justification for the exclusionary rule has disappeared.[3] *Amici* emphatically disagree and assert our position that common sense demonstrates that the exclusionary rule *does deter* unlawful police conduct and that no reliable empirical data has ever been developed to refute this Court's continued reliance on the deterrent assumption.[4] Conversely, empirical data does establish that the exclusionary rule has a negligible impact in freeing persons charged with crimes.[5]

Upon adopting the exclusionary rule in California, Chief Justice Traynor stated the deterrence rationale clearly and succinctly:

> Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, *it will discourage them.* Police officers and prosecuting officials are primarily interested in convicting crimi-

---

[3]Brief for the United States (pp. 40-77). See Burger, C.J., dissenting in *Bivens v. Six Unknown Agents*, 403 U.S. 388, 416 (1971), also relying on Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U.Chi. L.Rev. 665, 671 (1970).

[4]Historically the exclusionary rule evolved as a personal constitutional right, rooted in this Court's concern for judicial integrity and the right of privacy. *Boyd v. United States*, 116 U.S. 616, 653 (1886); *Weeks v. United States*, 232 U.S. 383, 392; *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Mapp v. Ohio*, 367 U.S. 543, 655-656, 658-659 (1961). See Part II of this brief, *infra*.

[5]*Canon, Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 So.Tex. L.J. 558, 577 (1982) [hereinafter cited as Canon, *Ideology and Reality*].

> nals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves since not to do so will jeopardize their objectives. (*People v. Cahan*, 44 Cal.2d 434, 448 (1955); emphasis added.)

Nobody has ever argued that either the exclusionary rule, or any other inducement, could ever compel 100% compliance with the Fourth Amendment by all magistrates, prosecutors and policemen at all times and all places in this country.[6] Degrees of compliance with constitutional requirements will necessarily vary from state to state, from city to city, from police force to police force, and among individual officers on any force.[7] Nonetheless, what the exclusionary rule has done is simplicity itself. Violation of the Fourth Amendment is discouraged. Compliance with the Fourth Amendment is encouraged.[8]

Critics of the exclusionary rule must necessarily take an extraordinarily cynical, albeit unstated, view of this nation's police officers. At the core of this criticism is the assumption that policemen are concerned solely with "ar-

---

[6]Professor Amsterdam characterizes the rule as providing "a counterweight within the criminal justice system that prevents the system from functioning as an unmitigated inducement to policemen to violate the Fourth Amendment on every occasion when there is criminal evidence to be gained by doing so." (Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 431 (1974) [hereinafter cited as Amsterdam].)

[7]Amsterdam, at 431-432.

[8]Theoretically the case for the exclusionary rule's ability to encourage positive and discourage negative behavior would seem to be at least as strong as the case for the death penalty's deterrent effect. Critics of the exclusionary rule, who support the death penalty, have trouble with this dilemma (see Wright, *Must the Criminal Go Free If the Constable Blunders*, 50 Tex. L.Rev. 736, at 739-740). Indeed, in view of the high crime rate in general it could be argued that our entire criminal justice system is having little deterrent effect. (Canon, *Ideology and Reality*, at 564).

rests" and not "convictions," and that therefore exclusion or illegally obtained evidence in the courtroom will not affect their behavior on the "streets." A necessary corollary to that argument, in the warrant context, is that the magistrate who issues a warrant with insufficient probable cause is also indifferent to the ultimate disposition of the case and therefore cannot be encouraged to act within constitutional guidelines.

Again, common sense should intervene. There is no reason to suppose that police officers view their jobs from such a narrow perspective. On the contrary, both logic and experience suggest that the police are very concerned that criminals be arrested *and* convicted. It is, after all, their sworn duty to gather evidence for that purpose. It is certainly not unreasonable to assume that the police, to that practical end, have been encouraged by the exclusionary rule to comply with the Fourth Amendment. Clearly, no convincing empirical data has been developed to undermine that assumption.[9]

C. Empirical Data on the Effect of the Exclusionary Rule Is Consistent With the Assumption That the Rule Encourages Compliance With Constitutional Standards

The Solicitor General in criticizing the exclusionary rule can hardly be encouraged by the fact that the principal study purporting to show by empirical data that the rule does not deter was published 13 years ago, or that it relied on statistical data now essentially 16 to 25 years out of date.[10] The thrust of Dalin Oaks' research was to

---

[9]Failing to cite data to support his position, the Solicitor General has instead attempted to shift the burden of proof to those who support the *status quo*. (Brief for the United States, pp. 38-39). However, the Solicitor General in proposing a novel "reasonable mistake" exception to the exclusionary rule, a concept representing a sharp break with 70 years of precedent, must bear that burden.

[10]Back in 1974, Dr. Bradley Canon was already referring to the Oaks study as dated. (Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 Ky. L.J. 681, 699 (1974) [hereinafter cited as Canon, *Is the Exclusionary Rule in Failing Health*].)

study arrests for narcotics, weapons, gambling and stolen property in one city, Cincinnati, before and after this Court's *Mapp* decision. He reasoned that if the exclusionary rule was detering unlawful conduct, arrests for these crimes, which generally required evidence to be seized, would decline. Failing to clearly find such a decline, Oaks found the results "inconclusive."[11]

The most telling criticism of the Oaks research is the extremely limited nature of his sample. Assuming he had established that the Cincinnati police were not, immediately after *Mapp*, being deterred from conducting unlawful searches, that would tell us very little about the overall effect of the exclusionary rule. The reaction of the Cincinnati police might have nothing in common with the reaction of the police forces in, for example, Boston, Buffalo, New York, or Baltimore. In fact other studies demonstrate that there was a dramatic decrease in arrests following *Mapp* in Baltimore and Buffalo.[12] In addition, this dated material tells us nothing about how the police, even in Cincinnati, have responded to the exclusionary rule during the last decade.

The only other empirical study that is generally relied on by critics of the exclusionary rule is the work of Oaks "successor," James Spiotto.[13] Spiotto's study was also confined to one city, Chicago, and likewise relies on statistical information that is now over ten years out of date.

---

[11]In spite of the "inconclusive" nature of the data, Oaks stated his "personal opinion" against the rule, an opinion he specifically divorced from his research. (Oaks, at 755.) The Solicitor General has relied heavily on that "personal opinion" in attacking the exclusionary rule. (Brief of the United States, p. 41.)

[12]Canon, *Is the Exclusionary Rule in Failing Health*, at 698-699, 706.

[13]Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Studies 243 (1973) [hereinafter cited as Spiotto].

It is thus subject to the same criticism as that of Oaks and also subject to a number of new ones.[14]

The most recent, and extensive empirical studies on the effect of the exclusionary rule have been undertaken by Bradley Canon.[15]

It should be noted that in the process of conducting a cost-benefit analysis of the exclusionary rule the Solicitor General does not mention any of Canon's studies. Unlike Oaks and Spiotto, the research was not confined to one city. The arrest statistics for "search and seizure" sensitive crimes were examined in nineteen cities. In approximately half of those cities there was a dramatic decrease in the number of arrests following *Mapp*, and in the other one-half the effect seemed to be minimum or absent.[16]

Canon also inquired into the issuance of search warrants in several cities before and after *Mapp*. He reasoned that an increase in applications for search warrants would demonstrate that less illegal searches were being conducted and that police forces in general were attempting to comply with the Fourth Amendment. He discovered that prior to *Mapp*, the use of search warrants in most cities was virtually non-existent. Conversely, subsequent to this Court's decision, a substantial number of warrants were obtained.[17]

---

[14]For a detailed criticism of Spiotto's work see Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 N.W.U. L.Rev. 740 (1974) [hereinafter cited as Critique].

[15]See Canon, *Ideology and Reality;* Canon, *Is the Exclusionary Rule in Failing Health;* Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Level: The Case of the Exclusionary Rule*, 15 Am.Pol.Q. 57 (1977) [hereinafter cited as Canon, *Testing the Effectiveness*]; Canon, *The Exclusionary Rule: Have Critics Proven That It Doesn't Deter Police?* 62 Judicature 398 (1979) [hereinafter cited as Canon, *The Exclusionary Rule*].

[16]Canon, *The Exclusionary Rule*, at 400.

[17]Canon, *Ideology and Reality*, at 589, citing the work of Michael Bane.

In addition, Canon's survey of law enforcement leaders demonstrated a wide-spread adoption, by police departments, of policies to implement this Supreme Court's *Mapp* and other search and seizure decisions.[18]

Canon concluded that "—the exclusionary rule can and does have a very real, although hardly universal, deterrent effect on the police.[19] Thus, while overall the empirical data may be characterized as "inconclusive," it is, in fact, quite consistent with this Court's continuing assumption that the exclusionary rule does encourage the police to conduct searches that comport with the Fourth Amendment.[20]

D. The Exclusionary Rule Is Seldom Implicated in the Release of Persons Charged With Crimes, Particularly Crimes of Violence

Popular rhetoric has placed upon the exclusionary rule the blame for many of the perceived ills of the criminal justice system.[21] The principal charge against the rule is that it is responsible for substantial numbers of guilty criminal defendants being set free. The Solicitor General argues, therefore, that the "cost" of the rule outweighs the benefit of deterring unlawful police conduct.[22] Recent empirical evidence shows that these charges are unfounded. At every level of the criminal justice system the effect of the exclusionary rule, particularly on "violent" crime, is remarkably modest.

---

[18]Canon, *Ideology and Reality*, at 569, citing the research of Professor Stephen Wasby.

[19]Canon, *The Exclusionary Rule*, at 400.

[20]*Stone v. Powell*, 428 U.S. 465, 492-493 (1976).

[21]See in particular Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 Judicature 214 (1978) [hereinafter, Wilkey, *The Exclusionary Rule*].

[22]Brief for the United States, pp. 38-77. See also Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 So.Tex.L.J. 590, 536 (1982).

1. Relatively Few Criminal Defendants Go Free Because of the Exclusionary Rule

In the first instance several studies have demonstrated that a very low percentage of overall complaints are rejected by prosecutors because of search and seizure problems.[23] A 1978 report by the independent General Accounting Office reported on the impact of the exclusionary rule in federal criminal prosecutions. It was revealed that the federal prosecutors dropped charges because of search and seizure problems in only .2% of all cases presented for prosecution.[24] Data developed in a recent study by the Department of Justice is consistent with the GAO report. That study considered the effect of the exclusionary rule in state criminal prosecutions in California.[25]

The study shows that over a three-year period, statewide, of all cases rejected for prosecution, 4.8% were rejected for search and seizure reasons. However, as only 17% of all cases presented were rejected this means that a mere .8% of the total number of felony cases were rejected for search and seizure reasons. (Dep't of Justice Study, p. 10).[26] Therefore, as in the GAO report, less than 1% of all criminal complaints were dismissed by the prosecution for search and seizure reasons.

---

[23]Canon, *Ideology and Reality*, at 573-576, and studies cited.

[24]Report by the Comptroller General of the United States (GAO): *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* (1979) [hereinafter cited as GAO Report]. The report showed that .4% of all cases rejected by the federal prosecutors were for search and seizure reasons. Since approximately 50% of all cases were rejected this means that search and seizure problems were implicated in rejecting only .2% of the total cases. (*Id.*, at 13-14.)

[25]*The Effect of the Exclusionary Rule: A Study in California*, Criminal Justice Research Report (1982) [hereinafter Department of Justice Study].

[26]Fyfe, *Enforcement Workshop, The NIJ Study of the Exclusionary Rule*, 19 Crim. L.Bull. 253, 257, n. 15 (1983) [hereinafter Fyfe].

These, and other studies[27] also show that less than 10% of the motions to suppress are granted and that even when granted the defendant will, in many cases still be convicted.[28] Studies of the California appellate system reveal that the appellate courts are as likely to reverse a *granting* of a motion to suppress as they are to reverse a denial.[29]

2. The Exclusionary Rule Has Virtually No Effect on the Successful Prosecution of Violent Crimes

It is clear that any impact of the exclusionary rule is felt almost exclusively in the area of drug offenses and other non-violent crimes. The principal empirical researchers, Oaks, Spiotto, and Canon have all recognized that the rule's effect is limited to victimless crimes and has only a tiny effect on the prosecution of violent crimes.[30]

Both the Institute For Law and Social Research (INSLAW) Study in Washington, D.C. and the Department of Justice study in California find that over 70% of the cases dropped were drug cases.[31] In evaluating that 70% figure it should be kept in mind that while most cases

---

[27]Canon, *Ideology and Reality*, at 574-575, Canon,, *Is the Exclusionary Rule in Failing Health*, at 721-722. See also Fyfe at p. 257. From 1976 to 1979 only .4% of the 150,000 felony cases processed in California Superior Courts resulted in dismissals because of search and seizure problems.

[28]Over half of the defendants whose search and seizure motions were granted in federal court were still convicted. (GAO Study, p. 13.)

[29]Davies, *Do Criminal Due Process Principles Make A Difference?*, Am.Bar Foundation Res. J. 247, 266-267. See also Annual Report, Judicial Counsel of California (1983) pp. 11-12, which showed that errors in motions to suppress evidence constituted only 5.1% of the reversals in the Court of Appeal. Since 12.5% of the total criminal cases resulted in reversals that means that reversals due to the granting or denying of motions to suppress constituted only .6% of all criminal cases decided.

[30]Dep't of Justice Study, p. 12; GAO Report, p. 7; Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L.Rev. 1027 (1974); Wright, at 741; Critique, at 774.

[31]Canon, *Ideology and Reality*, at 576.

rejected for search and seizure reasons are drug cases, the overwhelming percentage of drug cases do *not* encounter any such problem and are successfully prosecuted. This is confirmed by statistics in California compiled by Thomas Y. Davies, which showed that in 1980, statewide, prosecutors rejected 938 drug cases out of 40,451 narcotics arrests for a total of 2.3%. (See Canon, *Ideology and Reality*, p. 574, citing Davies.)

However, the Solicitor General has seriously misrepresented the statistics in the Department of Justice study to claim that prosecutors rejected 30% of all felony drug cases because of search and seizure problems. This misrepresentation was first detected in the *amicus* brief (at p. 49) of the Solicitor General in *Illinois v. Gates*, U.S. , 76 L.Ed.2d 527 (1983). Unfortunately that 30% figure was used by Justice White in a footnote in a concurring opinion in *Gates, id.*, at 561, n. 13. That footnote has now been elevated to the text as a centerpiece of the Solicitor General's brief in this case on the question of the "cost" of the exclusionary rule. (Brief for the United States, p. 70).

For the record, that 30% figure, as explained in the Department of Justice study, is solely for drug cases rejected in two of the 21 prosecutorial offices in Los Angeles County. This aberrant figure has no apparent statistical relevancy. The statewide figure is *not* 30% it is 2.3%, as explained above. This distortion by a factor of approximately thirteen of the "cost" of the exclusionary rule in drug cases obviously has a profound effect on any realistic cost-benefit analysis.

In any event, while the exclusionary rule has little real effect on the prosecution of most drug cases it clearly plays almost no role in the prosecution of crimes of violence.

The INSLAW study showed that of the over 5,000 persons charged with a violent crime *not one* was dropped by the prosecution because of search and seizure problems.[32]

---

[32]Canon, *Ideology and Reality*, at 576.

The Department of Justice study showed that out of over 530,000 felony cases processed in a four-year period in California only four involved murder cases with search and seizure problems.[33] The modest effect of the exclusionary rule on the criminal justice system is almost exclusively in the area of non-violent crimes. The critics of the rule have, in the words of one commentator, exaggerated the costs a "hundredfold or more."[34]

Again one must consider the effect of such an exaggeration on a serious cost-benefit analysis. If the costs of the exclusionary rule are only 1% of what some critics have contended, the case for a "reasonable mistake" modification collapses.

E. This Court's Assumption That the Exclusionary Rule Encourages Compliance With the Fourth Amendment Is Well Founded

In 1976, a majority of this Court, speaking through Justice Powell, strongly reaffirmed its belief in the exclusionary rule.

> Evidence obtained by police officers in violation of the Fourth Amendment is excluded at trial in the hope that the frequency of future violations will decrease.

---

[33]The Department of Justice study did attempt to demonstrate that defendants not prosecuted in San Diego County, because of search and seizure problems, were "career criminals." (*Id.* at pp. 13-18; Brief for the United States, p. 71, n. 36.) However, the data offered in this regard is clearly suspect. In the first instance there is no "base-line" figure to show the overall arrest record for persons arrested on felony charges. Thus, there is no basis for comparison to show that the non-prosecuted persons are particularly arrest-prone. In addition, the study admittedly uses arrest rather than conviction figures. These figures might simply demonstrate something this Court is now familiar with: the propensity of the San Diego police to arrest the same person time and again. See *e.g., Kolender v. Lawson*, ... U.S. ..., 75 L.Ed.2d 903, 908, n. 3 (1983) where Mr. Lawson was detained 15 times in 22 months by the San Diego Police. See also Fyfe at pp. 258-260.

[34]Canon, *Ideology and Reality*, at 577.

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.
>
> We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. (Fns. omitted; *Stone v. Powell, supra,* at 492-493.)

It is noteworthy that this Court's continued reliance on the efficacy of the exclusionary rule was reached "[d]espite the absence of supportive empirical evidence," and with the specific recognition of the studies of Oaks, Spiotto and Canon. (*Id.,* n. 34.) Certainly nothing in the way of empirical evidence has appeared since that decision which would support a reconsideration of that affirmation.

II

NO MAJOR EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED WITHOUT CONSIDERING ALL THE VALUES THE RULE PROTECTS

The proponents of a "reasonable mistake" exception to the exclusionary rule rest their case on a perceived absence of a deterrent effect on unlawful police conduct from the application of that rule in "reasonable mistake" situations. To the extent that other foundations can be found for the exclusionary rule in "reasonable mistake" situations, the argument of the "reasonable mistake" proponents is undercut. While the presence of other supports for the exclusionary rule may not have been sufficient to

require the rule's application in situations peripheral to the guilt-innocence issue in criminal law,[35] *amici* believe that the following direct benefits of the exclusionary rule, only briefly discussed here, must be given great weight when a major exception to the enforcement of the Fourth Amendment, going to the heart of what evidence will be presented on the issue of guilt or innocence in criminal cases, is being considered.

Before we discuss those additional foundations for the exclusionary rule some attention must be given to the plea that the exclusionary rule should be looked on with disfavor because it can suppress at trial "the very evidence that is most relevant and trustworthy" and "subverts the court's paramount truthfinding function." (Brief for the United States, pp. 68-69.) Long ago our system of values dictated that there were goals greater than detection and punishment of those guilty of a specific crime. Where the only evidence against a murder suspect is the body of his victim found as the result of torture of the suspect, our values demand that the murderer go free[36] despite the uncontrovertible evidence against him. *Blackburn v. Alabama* (1960) 361 U.S. 199; *Rogers v. Richmond* (1961) 365 U.S. 534. In the same situation, where the only evidence against the accused is obtained after denial of his right to counsel, its truthfulness is irrelevant and he cannot be convicted. *Escobedo v. Illinois* (1964) 378 U.S. 478. The values of the Fourth Amendment—security, privacy, dignity of the individual, judicial scrutiny of the actions of the executive's satraps—are worthy of the highest protection and cannot be submerged in the expediency of the criminal process.

---

[35] *United States v. Calandra* (1974) 414 U.S. 338 (grand jury proceedings); *United States v. Havens* (1980) 446 U.S. 620 (impeachment of testifying witness); *Stone v. Powell* (1976) 428 U.S. 465 (collateral attack).

[36] No one seems to argue, in these times, that we punish the torturer for his "blunder" and use the evidence against the murderer.

1. Retired Associate Justice Potter Stewart has recently characterized with great insight his concern with a "reasonable mistake" exception as a shift in focus from "what does the Fourth Amendment require?" to "what will the courts allow me to get away with?" (Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Col. L.Rev. 1365, 1403 (1983).) He believes that adopting the exception would have a "profound symbolic effect" on the perception by both the police and the public of this Court's commitment to enforcement of the Fourth Amendment. (*Ibid.*, p. 1400.) The first and perhaps most important foundation of the rights of security and privacy in this country is the belief that these rights will be given life, will be respected and will be enforced by the courts. The *reality* of security and privacy is verified by an effective exclusionary rule after the government trespasses from whatever motive. A retreat to a "what can we 'get away with'" philosophy removes that foundation.

2. As pointed out by this Court in 1914 when it held that the Fourth Amendment included an exclusionary rule in *Weeks v. United States*, 232 U.S. 383, 392-394, every time the courts allow a violation of a defendant's Fourth Amendment rights to contribute to his conviction the courts approve an incursion into territory forbidden by the constitution and left by that document to the guardianship of the courts.[37] The policeman, operating directly

[37]This "judicial integrity" rationale was also used by the court in *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); see also Justice Holmes, dissenting in *Olmstead v. United States*, 227 U.S. 438, 470(1928); *Terry v. Ohio* (1968) 392 U.S. 1, 13 ["A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence. . . ."]. The judicial integrity rationale was adhered to by at least eight Justices in *United States v. Payner* (1980) 447 U.S. 727, 735 (n. 8), 738 [". . . the Fourth Amendment exclusionary rule . . . is applied in part 'to protect the integrity of the court . . .' ".]

with the laws whose application belongs to the courts, is the agent of that system and his actions cannot be disowned by it. While a heavier condemnation is rightly directed at those officers who intentionally flout the law in their zeal to enforce it, there is no doubt that every violation of the Fourth Amendment is unconstitutional and every conviction obtained by such means is an affront to the constitution; a "reasonable mistake" exception would encourage such affronts in close cases rather than encouraging the police to take all possible steps to protect constitutional rights.

III

THE PROPOSED REASONABLE MISTAKE EXCEPTION WOULD ENCOURAGE FOURTH AMENDMENT VIOLATIONS, BE DIFFICULT AND COMPLEX TO APPLY AND WOULD FREEZE DEVELOPMENT OF FOURTH AMENDMENT LAW

A. The Proposed "Reasonable Mistake" Exception Will Encourage Police to Obtain Warrants from Rubber Stamp Magistrates and Thus Increase the Number of Unlawful Searches Undertaken for Exploratory Purposes on Less Than Probable Cause

The proposed exception to the exclusionary rule would encourage police officers to resort to "rubber stamp" magistrates more than they do at present and thus increase the number of open-ended exploratory search warrants based on less than probable cause. Most such warrants would be excluded from review by the proposed exception and would increasingly become the rule, as the bad drives out the good in economics.

Zealous police officers, engaged in the often-competitive enterprise of ferreting out crime, are aware of the existence of rubber stamp magistrates—magistrates who through willfulness, ignorance or naivete will, whenever asked, sign a search warrant which is overbroad in its scope or which is not supported by the minimum facts

required under law to support a finding of probable cause. Studies have shown that police do shop around for a magistrate who is "lenient in issuing search warrants" and that there is "substantial disparity between magistrates as to how much evidence is required to obtain a search warrant." Tiffany, McIntyre & Rotenberg, *Detection of Crime*, 120, 204 (1967).

At present, conscientious officers are discouraged from resorting to rubber stamp magistrates because warrants issued by those magistrates are subject to review. Through pride in their work and the desire to obtain a good warrant whose fruits will be admissible most officers will not resort to rubber stamp magistrates but will instead endeavor to produce warrants and affidavits which will pass muster upon review—warrants and affidavits which will "stand up in court."

"Why bother?" will be the response of the police if this court adopts the proposed "reasonable mistake" exception for search warrants. Why bother to accumulate facts supporting probable cause for a search warrant? Why bother to draft a warrant particularly describing the place to be searched and the evidence to be sought? Why bother, in short, to comply with the requirements of the Fourth Amendment regarding warrants?

The former New York City Deputy Police Commissioner in charge of legal matters said in 1965:

> The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?

N.Y. Times, April 28, 1965, at 50 col. 1, quoted in Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, De-*

velopment and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Columbia L. Rev. 1365, 1386 (1983). Under the proposed exception for warrants, the number of warrants sought and obtained would increase, as there would no longer be any reason for warrants to be more than a *pro forma compliance* with the requirements of the fourth amendment.[18] The consequent surrender of privacy rights—of the innocent and the guilty—would be enormous.

While at present law-abiding and conscientious police officers seek to obtain their warrants from those judges and magistrates who will not sign a questionable warrant and only officers whose sole concern is their arrest records seek out the rubber stamp magistrates and judges, the proposed exception will encourage all officers to seek out the rubber stamp magistrate since their jobs will be easier if they do. As a consequence, the search warrant issued on less than probable cause will become the rule, not the exception. The search warrant which does not particularly describe the place to be searched and the evidence to be sought will become the rule, not the exception. The standard will be lowered with each warrant, until the general warrant looms large in all but name.

The most well-intentioned, law-abiding and conscientious police officers will be encouraged, even driven, to take advantage of the new method of obtaining admissible evidence, as there can be no doubt that exploratory warrants can increase greatly the possibility of finding evidence in

---

[18]The Solicitor General concedes that some warrants would be lacking in probable cause to such an egregious degree that the exclusionary rule should be utilized. Brief for the United States, p. 65. Two comments are in order: (1) What warrant could be worse (i.e. more clearly void on its face) than the one in *Sheppard,* which the Solicitor General argues should be approved? (2) Once probable cause is lacking, what possible "bright line" standard could be stated for lower courts to decide which warrants still did not authorize a legal search?

crime. An officer whose job is to seek admissible evidence of crime would be dubbed a fool if his scruples prevented him from using to advantage the premium put on the rubber stamp by the proposed exception. He could in fact be said to be derelict in his duty if he did not do so. The police are properly partisan, investigatory, and oriented toward discovering and convicting perpetrators of crime:

> [I]t is necessary to begin with the right question, which is whether admitting the evidence in such instances would create an additional incentive to infringe upon fourth amendment rights. I see no basis for assuming the answer to be other than yes.

La Fave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 Univ. Pittsburgh L. Rev. 307, 353 (1982).

There are judges who issue exploratory warrants on less than probable cause. Some "judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community." Wilkey, *A Call for Alternatives to the Exclusionary Rule,* 62 Judicature 351, 356 (1979). There are at present inhibitions on doing so, and inhibitions on police officers seeking out such judges for search warrants that will not stand up in court. The vast majority of warrants are issued by the lowest courts; their orders are subject to review. The proposed "reasonable mistake" exception would remove those inhibitions and exempt from review these orders of the lowest courts affecting basic constitutional rights where they mean most to the citizens, in the privacy of their homes. The irony of exempting this power from review by higher courts is overwhelming.

Thus, there is at present an incentive for police to frame good warrants and to provide probable cause for warrants. There is an incentive for magistrates not to issue bad warrants, to correct mistakes. Under the proposed exception

> [T]here is no incentive—apart from a professional desire to comply with the fourth amendment—for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.
>
> Stewart, *supra*, 83 Columbia L. Rev. at 1403.

B. The Proposed Exception Will Introduce a Two-Step Analysis Into Every Search and Seizure Hearing, Confuse the Area of Fourth Amendment Law With a Dual Test and Make It Difficult to Know What Standards to Apply in Assessing the Admissibility of Evidence Obtained in Violation of the Fourth Amendment

"Probable cause" is a phrase found in the Fourth Amendment. A long history of judicial interpretation has made it a standard widely understood and followed. It is a "reasonable man" standard which, though stated in the abstract and not without problems, has through countless cases over the years acquired a familiarity and simplicity making it an objective test susceptible of uniform application by police officers and courts alike.

To this it is proposed to add a second test, to introduce a two-step analysis into every search and seizure hearing, to apply a dual test to each police action cognizable under the Fourth Amendment. The number of motions made by defense attorneys will not diminish; however, the length of hearings will increase as each such motion will, under the dual test, require both a judgment as to probable cause and then a judgment under the unknown "reasonably well-trained officer" standard.

The latter standard has no history. It is not known how it differs, if it does, from the reasonable man standard. In effect, it will create two levels of probable cause to be tested in each search and seizure hearing: the reasonable man standard and the reasonably well-trained officer standard. While the trial courts are well capable of applying

the first standard and producing a general and uniform predictability of law, the same cannot be said of the second standard. If there is confusion as to what constitutes probable cause, the two-step analysis will confound the confusion.

The dual test will be required in every hearing on every motion. The trial court must engage in the two-step analysis because its rulings are subject to review, and the reviewing court must have the trial court's findings in order to review them.

Since the new test has no history, it can be expected to inject uncertainty and confusion into every hearing in the trial courts and into every review by the appellate courts. While there is general consistency and specific guidance in applying the probable cause standard, there can be no consistency, no guidance, in applying a reasonably well-trained officer standard.

The new dual test will erase all bright lines. If the new dual test is adopted, it will be "essential to have a Court opinion . . . that provides 'specific guidance to police and courts . . . '" *United States v. Ross,* 456 U.S. 798, 826 (Powell, J., concurring), but is that possible? Will there not be as many court opinions as there are courts, all differing and all confused in their understanding and interpretation of the new rule?

And to what end? The percentage of felony cases affected by the exclusionary rule is already minuscule. What minuscule part of that minuscule percent will be affected by a new rule which must cause confusion and uncertainty while greatly increasing the time and concentration which must be given to such cases by both trial and appellate courts?

The Court recently adopted a two-step analysis for assessing the application of the Fifth Amendment exclusionary rule in some cases. *Oregon v. Bradshaw,* U.S. ,

77 L.Ed. 2d 405, 103 S. Ct. 2830 (1983). The proposed "reasonable mistake" exception to the exclusionary rule would necessitate such a dual test in all Fourth Amendment cases. Of the test adopted in *Oregon v. Bradshaw, supra,* Justice Powell wrote, "My concern is that a two-step analysis could confound the confusion . . . " *Oregon v. Bradshaw, supra,* 77 L.Ed. 2d at 415, 103 S. Ct. at 2837. In that case, at least, both steps are within the purview of general judicial knowledge and experience. Here, the second step is a judicial "wild card" with no past and an uncertain future.

If the proposed exception were adopted some interesting and difficult issues of *stare decisis* would be created. For example, if the highest court of a state holds, as in *Quintero,* that an arrest took place without probable cause but the subsequent search does not result in the invocation of the exclusionary rule of the Fourth Amendment because there was a "reasonable mistake," would the same mistake be reasonable in a factual situation occurring after that decision became public? What if the police officer making the arrest knows of a similar factual situation where a *trial court* held a search illegal under the Fourth Amendment? Is his arrest still a "reasonable mistake" despite such knowledge? How is such knowledge proven? Or, perhaps, once a mistake has been found to be reasonable it will always be reasonable, in which case the Fourth Amendment is, in effect, amended by each reasonable mistake.

C. The "Reasonable Mistake" Exception Would Freeze Development of Fourth Amendment Law By Removing a Defendant's Incentive to Challenge Arguable Cases

Growth and development, a sure sign of life and health, would be denied the Fourth Amendment under a "reasonable mistake" exception. We illustrate this point by a discussion of the recent *Steagald v. United States* (1981) 451 U.S. 204. That case, over the dissents of two Justices, established an extremely important point: that in the

absence of exigent circumstances or consent the combination of an arrest warrant and probable cause that the subject of that warrant was present in a third party's home is not sufficient to allow police invasion of that home without the authorization of a search warrant issued by a neutral magistrate. When the police made the entry into Steagald's home to execute their arrest warrant they were not acting lawlessly or even in an area of uncertainty. Two years previous to the entry into Steagald's home, the Fifth Circuit had decided that an officer holding a valid arrest warrant who reasonably believes its subject is within a home belonging to a third party need not obtain a search warrant to enter that home to execute the warrant. *United States v. Cravero,* 545 F.2d 406, 421 (1976). That decision was the final authority on the subject in Atlanta, where the entry into Steagald's home was made. Obviously, the DEA officers who entered Steagald's home were in perfect good faith.

If the "reasonable mistake" exception now being proposed had been in effect at the time of the entry into Steagald's home, the legality of that entry would have been a moot point for Steagald. He would have no incentive to raise the issue since he would lose whether or not the entry had violated his rights to privacy and security under the Fourth Amendment. This Court would never have heard Steagald's case and the constitutional point might never have been decided. The warning of the majority of this Court that a rule allowing the police, acting alone, to decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant "would create a significant potential for abuse" (451 U.S. at 215) would never have been given. *Steagald* was the perfect case for the application of the "reasonable mistake" rule and is the perfect example of why it should not be applied or adopted.

IV

A WARRANT ISSUED ON A SHOWING WHICH DOES NOT AMOUNT TO PROBABLE CAUSE IS NOT A CONSTITUTIONAL WARRANT

A. The History of the Warrant Clause of the Fourth Amendment Cautions Against Adoption of Exceptions to the Probable Cause Requirement

It was not primarily police misconduct which inspired the adoption of the Fourth Amendment. The Fourth Amendment, and particularly the warrant clause, was an outgrowth of the issuance of general warrants and writs of assistance by colonial magistrates. The authors of the Bill of Rights were especially concerned about abusive searches performed with the aid and encouragement of judicial officers, because that was the infringement of rights they had experienced. They wanted to prevent, by constitutional guarantee, the kinds of systematic, court-sanctioned invasions of privacy which resulted from warrants which could issue without adequate probable cause for the search."

The lessons of this history should not be ignored. If America today does not suffer from the routine issuance of invalid general warrants, it is because the framers took care to protect us from that situation. Giving magistrates *carte blanche* to issue warrants, free from any review of higher courts except in the clearest of cases, would sanction by implication the very abuses the Fourth Amendment was adopted to prevent.

"Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 Journal of Criminal Law & Criminology 635, 636 (1978), fns. omitted. Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule In Search and Seizure Cases*, 83 Cal. L.Rev. 1365, 1372-1377 (1983); see generally the authorities cited in Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L.Rev. 349, 450-451, n. 168.

B. The Preference Given to Warrants Is a Sufficient "Reward" for the Good Faith of the Police in Seeking Judicial Authorization for Their Actions

The law *already* rewards the officer who seeks a warrant by making it less likely that the evidence he seizes pursuant to the warrant will be suppressed. This Court has directed that warrants be interpreted in a common sense manner and that "the resolution of doubtful or marginal cases [be] largely determined by the preference to be accorded to warrants." *(United States v. Ventresca,* 380 U.S. 102, 109 (1965),[40] citation omitted.) Thus, the police officer who desires a successful prosecution is duly rewarded for his good faith in seeking a warrant. His basis for the search is given that most valuable of considerations, the benefit of the doubt.

No *additional* advantage should be extended. If a warrant cannot meet this minimal standard of reasonableness even after all doubts are resolved in its favor, it should not be allowed to form the justification for a search. Every invalid warrant represents an unjustified invasion of an individual's privacy, and they are not so rare that the risk can be totally discounted, even with the exclusionary rule as a sanction.

Without the exclusionary rule as a sanction, the risk of invalid warrants would be much greater. In a nation with thousands of magistrates, some inevitably will know more about Fourth Amendment guarantees than others, and be more careful in the issuance of warrants. Careful magistrates, for example, often protect citizens' rights without stifling a criminal investigation by asking the

[40]When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . ." (*Jones v. United States,* 362 U.S. 257, 271 (1960).)

police to do further investigation before they will issue a search warrant. As discussed in the previous section, in the absence of the exclusionary rule, police would be encouraged to seek magistrates who knew little or nothing about Fourth Amendment law, and would issue a warrant on little more than the fact one was sought by the police. Unless a warrant fell below the amorphous standard of "objective reasonableness," the citizens of the United States would have no real protection from unconstitutional searches authorized by such uninformed magistrates.

C. No Feasible Alternative to Exclusion Exists Where There Is a Warrant

Suggestions for an effective alternative remedy to the exclusionary rule are conspicuously weak in the briefing in these cases. Whatever the possibility of fashioning an alternative remedy for unlawful warrantless searches, there is little prospect at all of doing so for searches carried out pursuant to a warrant issued without probable cause. The magistrate who authorized the unlawful search would have acted in good faith, and would certainly enjoy judicial immunity from civil suit. So even if a fair special tribunal could be found to hear civil search cases, and the financially strapped federal and state governments could be expected to appropriate substantial sums to pay judgments for unlawful searches—two highly questionable assumptions—the person whose person, home, automobile or effects were unlawfully searched pursuant to an invalid warrant would have no redress from that tribunal.

A particular magistrate who repeatedly authorized outrageous searches might eventually be removed by the appointing power or defeated in an election, but only constant and extreme violations of the Fourth Amendment would be likely to be cause for removal from office.[41] Even

[41]It is the routine violations of the Fourth Amendment, rather than the exceptional incidents which generate public outcry, which most require the exclusionary sanction. Shocking or violent intru-

then, the crucial question would most likely be the political power of the targets of the outrageous searches, not the seriousness of the constitutional violations themselves.

CONCLUSION

No reevaluation of the exclusionary rule can properly ignore the history of the rule. Integral to that history is its place in protecting the rights of privacy of our citizens and vindicating their Fourth Amendment rights, as well as encouraging lawful conduct by the police. Although, as we have argued, the deterrent effect of the exclusionary rule is supported by experience and common sense and encourages the best in our police and magistrates, it does not stand on that basis alone. Reflecting on Orwell's warning on the direction our society may take in *1984*, we of the organized criminal defense bar are worried about our capacity to protect fairness and justice in the never-ending square-off against over zealous government prosecution. We implore this Court to hold the line on the Fourth Amendment.

Respectfully submitted,

MARSHALL W. KRAUSE
KRAUSE, TIMAN, BASKIN, SHELL & GRANT
Counsel of Record for Amici Curiae
National Association of Criminal Defense Lawyers & California Attorneys for Criminal Justice
QUIN DENVIR, STATE PUBLIC DEFENDER
STEFFAN B. IMHOFF, DEPUTY
CHARLES SCOTT SPEAR
Attorneys for Amici Curiae

---

sions can perhaps be curtained by civil or criminal actions against the offending party, prevention of the less egregious violations must depend on exclusion of the evidence thus obtained. (Kamisar, *A Defense of the Exclusionary Rule*, 15 Crim. L.Bull. 5, 32-34 (1979).

Office - Supreme Court, U.S.
FILED
NOV 21 1983
[illegible] STEVAS,
CLERK

Nos. 82-1771, 82-963, and 82-1[illegible]1

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERTO ANTONIO LEON, et al., *Respondents*.

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,

v.

OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,

v.

FIDEL QUINTERO, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

NATIONAL LEGAL AID
AND DEFENDER ASSOCIATION
1625 K Street, NW
Washington, D.C. 20006

By: KENNETH M. MOGILL
MOGILL, POSNER, COHEN & WEISS
1455 Centre Street
Detroit, Michigan 48226
(313) 962-7210

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-4795

TABLE OF CONTENTS

	Page
Index of Authorities	iii
Interest of *Amicus*	1
Summary of Argument	1
Argument:	
INTRODUCTION	2
ADOPTION OF THE EXCLUSIONARY RULE WAS NECESSITATED BY WIDESPREAD POLICE ABUSE, AND THE RULE IN ITS PRESENT FORM PROVIDES THE ONLY MEANS OF PROTECTING THE VALUES AND POLICIES OF THE FOURTH AMENDMENT.	4
AN OFFICER'S INTENT IS IRRELEVANT; A "GOOD FAITH" OR "REASONABLE MISTAKE" TEST IS INHERENTLY SUBJECTIVE AND WOULD SEVERELY UNDERMINE FOURTH AMENDMENT RIGHTS.	8
— The Irrelevance Of Intent	8
— The Inherent Subjectivity Of A "Good Faith" Or "Reasonable Mistake" Test	10
— The Impact Of A "Reasonable Mistake" Or "Good Faith" Exception On Fourth Amendment Rights	11
— Warrant cases	11
— In general	13
— Current Law Is Already Adequately Flexible	14
THE EXCLUSIONARY RULE IN ITS PRESENT FORM HAS BEEN DEMONSTRABLY SUCCESSFUL IN DETERRING UNLAWFUL POLICE CONDUCT.	16

Page

A "GOOD FAITH" OR "REASONABLE BELIEF" TEST WOULD ENCOURAGE POLICE IGNORANCE, BE ADMINISTRATIVELY UNFEASIBLE AND WOULD CURTAIL SUBSTANTIVE DEVELOPMENT OF FOURTH AMENDMENT LAW. 19

— Encouragement Of Police Ignorance 19

— Administrative Unfeasibility Of A "Good Faith," "Reasonable Mistake" or "Technical Violation" Rule 21

— Impact On Development Of Substantive Law 23

— Impossibility Of "Technical" Or "Negligent" Violation Exception 23

THE EXCLUSIONARY RULE HAS MINIMAL EVIDENTIARY COSTS. 24

— Introduction 24

— Empirical Evidence 27

— Objective Limits On Application Of The Rule 29

A "GOOD FAITH" OR "REASONABLE MISTAKE" EXCEPTION WOULD HAVE DETRIMENTAL SYMBOLIC AND HUMAN COSTS, PARTICULARLY FOR MINORITIES. 30

— Symbolic Costs 30

— Impact Of The Rule On Protecting The Rights Of Minorities 31

— The Importance Of Stability In The Law 32

Conclusion 33

INDEX OF AUTHORITIES

Page

Cases:

Baker v *Carr*, 368 US 186 (1962) 7

Beck v *Ohio*, 379 US 89 (1964)..... 3, 8, 15

Bell v *United States*, 254 F2d 82 (DC Cir 1958) ... 10

Brinegar v *United States*, 338 US 160 (1949) 3, 6

Brown v *Board of Education*, 347 US 483 (1954)... 7

Brown v *Illinois*, 422 US 590 (1975)..... 5

Bumper v *North Carolina*, 391 US 543 (1968) 25

Chaney v *Wainwright*, 460 F2d 1263 (5th Cir 1972) 10

Coolidge v *New Hampshire*, 403 US 443 (1971).. 4, 13, 25, 35

Davis v *Mississippi*, 394 US 721 (1967)..... 25

Delaware v *Prouse*, 440 US 648 (1979)..... 9, 15

Draper v *United States*, 358 US 307 (1959) 15

Dunaway v *New York*, 442 US 200 (1979)..... 15, 16

Edwards v *Arizona*, 451 US 477 (1981) 33

Elkins v *United States*, 364 US 206 (1960)..... 4, 5, 6, 25, 34

Florida v *Royer*, __ US __ (1983) 9

Franks v *Delaware*, 438 US 154 (1978)..... 5, 13, 31

Frisbie v *Collins*, 342 US 519 (1952)..... 29

Gerstein v *Pugh*, 420 US 103 (1975)..... 5, 13

Gilman v *Philadelphia*, 3 Wall 713 (1866) 33

Goodtitle ex dem. Pollard v *Kibbe*, 9 How 471 (1850) 33

Henry v *United States*, 361 US 98 (1959)..... 8, 15

Page

Hill v *California*, 401 US 797 (1971) 15

Illinois v *Gates*, __ US __ (1983)..... 10

Irvine v *California*, 347 US 128 (1954)..... 23, 24

Johnson v *United States*, 333 US 10 (1948)... 6, 13-14

McNabb v *United States*, 318 US 332 (1943).... 5, 32

Malinski v *New York*, 324 US 401 (1945)..... 2, 33

Mapp v *Ohio*, 367 US 483 (1961)..... 4, 18

Massachusetts v *Painten*, 389 US 560 (1968) 9

Michigan v *DeFillippo*, 443 US 31 (1979) 30

Michigan v *Tucker*, 417 US 433 (1974) 11

Miranda v *Arizona*, 384 US 436 (1966)..... 24, 33

NAACP v *Alabama*, 357 US 449 (1958)..... 23

Nardone v *United States*, 308 US 341 (1939) 30

Olmstead v *United States*, 277 US 436 (1928)... 5, 34

People v *Cahan*, 44 Cal 2d 434, 282 P2d 905 (1955) 18

People v *DeFore*, 242 NY 13, 150 NE 585 (1926) .. 25

Powell v *Alabama*, 287 US 45 (1932) 7

Rawlings v *Kentucky*, 448 US 98 (1980) 29

Reid v *Georgia*, 448 US 438 (1980) 9

Rochin v *California*, 342 US 165 (1952)..... 32

Scott v *United States*, 436 US 128 (1978) 9

Shadwick v *City of Tampa*, 407 US 345 (1972) 12, 13

Stone v *Powell*, 428 US 465 (1976)..... 5, 29, 30

Page

Stump v *Sparkman*, 435 US 349 (1978) 31

Terry v *Ohio*, 392 US 1 (1968)..... 5, 30, 32

United States v *Bailey*, 628 F2d 938 (6th Cir 1980) 34

United States v *Bethea*, 442 F2d 790 (DC Cir 1971) 26

United States v *Bonds*, 435 F2d 164 (9th Cir 1970) 26

United States v *Bugarin-Casas*, 484 F2d 853 (9th Cir 1973)..... 10

United States v *Caceres*, 440 US 741 (1971) 15

United States v *Calandra*, 414 US 338 (1974)..... 29

United States v *Ceccolini*, 435 US 268 (1978)..... 29

United States v *Cortez*, 449 US 411 (1981) 15

United States v *Crews*, 445 US 463 (1980) 29

United States v *DiRe*, 332 US 581 (1948)..... 3, 14

United States v *Giacalone*, 541 F2d 508 (6th Cir 1976)..... 15

United States v *Harris*, 403 US 573 (1971) 15

United States v *Havens*, 446 US 620 (1980) 29

United States v *Janis*, 428 US 433 (1976) 29

United States v *Johnson*, 457 US 537 (1982)..... 8

United States v *Peltier*, 422 US 531 (1975)..... 5, 23

United States v *Pintado*, __ F2d __ [#82-5503] (11th Cir 1983) 25

United States v *Rabinowitz*, 339 US 56 (1950)..... 28

United States v *Ross*, 456 US 798 (1982)..... 9

United States v *Salvucci*, 448 US 83 (1980) 29

United States v *Soto*, __ F2d __ [#83-1099] (2d Cir 1983)..... 25

Page

United States v *United States District Court*, 407 US 297 (1972) 12

United States v *Ventresca*, 380 US 102 (1965) 15

United States v *Williams*, 622 F2d 830 (5th Cir 1980) 13

Warden v *Hayden*, 387 US 294 (1967) 15

Weeks v *United States*, 232 US 383 (1914).... 4, 6, 12

Weems v *United States*, 217 US 349 (1910)..... 8

Wolf v *Colorado*, 338 US 25 (1949) 4

Constitutions:

United States Constitution:

Fourth Amendment ..... passim

Articles and Books:

67 ABA J 1614 (1981) 29

Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J Crim L & Criminology 635 (1978) 17, 31

Canon, "Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention," 23 S Tex L J 559 (1982) 31

Dash, Knowlton and Schwartz, *The Eavesdroppers* (1959) 34

Geller, "Is the Evidence in on the Exclusionary Rule?" 67 ABA J 1642 (1981)..... 6, 28

Page

General Accounting Office, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," (1979) 27

Kamisar, "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment," 62 Judicature 66 (1978) 18

Kaplan, "The Limits of the Exclusionary Rule," 26 Stan L Rev 1027 (1974) 19-20

LaFave, *Search and Seizure* (1981 Supp) 29

LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 Pitt L Rev 307 (1982) 20, 23, 31

LaFave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich L Rev 987 (1965) 12

Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L Rev 24 (1980) 17, 31

McGowan, "Rule-Making and the Police," 70 Mich L Rev 659 (1972) 31

Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo L J 365 (1981) 5, 6, 16, 18, 20, 25

National Institute of Justice, "The Effects of the Exclusionary Rule: A Study in California," December, 1982 ..... 27, 28

Page

Pitler, " 'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Cal L Rev 579 (1968) 24

Report of the National Advisory Commission on Civil Disorders (1968) 32

Traynor, "*Mapp* v *Ohio* at Large in the Fifty States," 1962 Duke L J 319 ..... 5, 19

United States Commission on Civil Rights, *Who Is Guarding the Guardians?* (1981) 32

Westin, *Privacy and Freedom* (1967) 34

Wilkey, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," (National Legal Center for the Public Interest, 1982) 20

Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 215 (1978) 22, 25

Miscellaneous:

FRE 403 26

Chicago Tribune, "Defend the Exclusionary Rule," January 16, 1983, sec 2, p 6 32

Hearings on the "Exclusionary Rule Bills," 97th Congress, 1st and 2nd Sessions, Senate Judiciary Committee, Subcommittee on Criminal Law (1982) ..... passim

New York Times, "Let Facts, Not Faith, Guide the Police," January 21, 1983, p 24 32

Nos. 82-1771, 82-963, and 82-1711

IN THE

Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERTO ANTONIO LEON, et al., *Respondents*.

COMMONWEALTH OF MASSACHUSETTS, *Petitioner*,

v.

OSBORNE SHEPPARD, *Respondent*.

STATE OF COLORADO, *Petitioner*,

v.

FIDEL QUINTERO, *Respondent*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, AND THE SUPREME COURT OF COLORADO

BRIEF OF NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMICUS CURIAE

INTEREST OF AMICUS

(1) The National Legal Aid and Defender Association [NLADA] is a not-for-profit organization whose members include the great majority of public defender offices, coordinated assigned counsel systems and legal services agencies in the nation. The organization also includes two thousand individual members, most of whom are private practitioners.

NLADA's primary purpose is to assist in providing effective legal services to persons unable to retain counsel. In carrying out this purpose, NLADA has a strong interest in protecting its members' clients' constitutional rights, particularly from violation by police, and in assuring full access to the courts for trial and appellate level litigation concerning those rights.

(2) NLADA joins respondents in opposing any modification of the exclusionary rule.

(3) NLADA has received the written consent of all parties for the filing of this brief.

SUMMARY OF ARGUMENT

The exclusionary rule in its present form is the sole means of effectively protecting the policy values underlying the Fourth Amendment. It was preceded by widespread police illegality, and it has resulted in extensive improvement in police practices at minimal evidentiary cost. Weakening the rule would produce a corresponding reversion to police illegality.

The Fourth Amendment was designed to limit the conduct of police and of magistrates, and the founders understood that these limits were preferable to placing discretionary power in the hands of the police. The

occasional loss of evidence or a conviction resulting from adherence to Fourth Amendment values was properly seen as the lesser danger.

Fourth Amendment jurisprudence already takes into account an officer's reasonable mistakes of fact and accords great deference to a magistrate's decision to issue a warrant.

A "reasonable mistake" or "good faith" exception to the exclusionary rule is inherently subjective, and it would undermine the Warrant Clause, erode protection of Fourth Amendment rights, especially of minorities, halt substantive development of Fourth Amendment law, encourage police ignorance and be administratively unfeasible; it would ultimately leave people "secure . . . only in the discretion of the police."

In the past ten years this Court has significantly narrowed the scope of application of the rule on the basis of objective criteria. No further modification is warranted.

ARGUMENT

A "REASONABLE MISTAKE" OR "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS INHERENTLY SUBJECTIVE; IT WOULD UNDERMINE THE WARRANT CLAUSE, ERODE PROTECTION OF FOURTH AMENDMENT RIGHTS, ESPECIALLY OF MINORITIES, HALT SUBSTANTIVE DEVELOPMENT OF FOURTH AMENDMENT LAW, ENCOURAGE POLICE IGNORANCE AND BE ADMINISTRATIVELY UNFEASIBLE; IT SHOULD, THEREFORE, BE REJECTED.

INTRODUCTION

The history of American freedom is, in no small measure, the history of procedure. *Malinski* v *New York*, 324 US 401, 414 (1945), Frankfurter, J., concurring.

A "reasonable mistake" or "good faith" exception to the exclusionary rule would respond to the frustrations of police officers who execute unconstitutional warrants or err in determining whether they have sufficient information to justify an arrest or stop or excuse the seeking of a warrant. Evaluating the question at bar by reference to police officers' states of mind, however, would turn the Fourth Amendment on its head: Adopting such a rule would place the police above the law and unleash forces that would, in the end, leave people "secure . . . only in the discretion of the police." *Beck* v *Ohio*, 379 US 89, 98 (1964).

To the framers of the Constitution, the Fourth Amendment was "*designed*," "after consulting the lessons of history, . . . to place obstacles in the way of a too permeating police surveillance," for they understood that the latter "was a greater danger to a free people than the escape of some criminals from punishment." *United States* v *DiRe*, 332 US 581, 595 (1948) (emphasis added). The privacy rights protected by the Amendment are among our most cherished, yet they are among "the most difficult to protect [, for] officers themselves are the chief invaders, there is no enforcement outside of court[,]" and, unlike many other constitutional rights, "there is no way in which the innocent citizen can invoke advance protection." *Brinegar* v *United States*, 338 US 160, 181-182 (1949), Jackson, J., dissenting.

Moreover, the values of the Fourth Amendment are particularly vulnerable to criticism. Its benefits are largely abstract and unseen — the unlawful stop or search of a home that is *not* made, the unfounded warrant that is *not* issued — while the costs of enforcing its mandates are concrete and irritating — the suppression of actual evidence. In times of great frustration about crime, this apparent anomaly leaves the rules by which the Amendment is enforced easy targets for criticism, yet as Justice Stewart emphasized in

Coolidge v *New Hampshire*, 403 US 443, 455 (1971), it is in times such as these that the Amendment and these rules must be most vigorously protected.

In *Weeks* v *United States*, 232 US 383 (1914), this Court unanimously held that the values underlying the Fourth Amendment could *only* be adequately protected by excluding from evidence in federal court materials obtained unconstitutionally by federal officers. In so ruling, this Court stressed that *without an exclusionary rule "the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution."* 232 US at 393 (emphasis added).

These words were reiterated in *Elkins* v *United States*, 364 US 206, 209-210 (1960), and echoed again in *Mapp* v *Ohio*, 367 US 643, 660 (1961), where, in the words of a former Attorney General, Justice Clark, this Court held that the exclusionary rule is "a clear, specific, and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words'[,] . . . an empty promise."[1]

ADOPTION OF THE EXCLUSIONARY RULE WAS NECESSITATED BY WIDESPREAD POLICE ABUSE, AND THE RULE IN ITS PRESENT FORM PROVIDES THE ONLY MEANS OF PROTECTING THE VALUES AND POLICIES OF THE FOURTH AMENDMENT.

Recent decisions of this Court have focused on deterrence of unlawful police conduct as the primary justification for the exclusionary rule, minimizing the value of other considerations. Cf., e.g., *Stone* v *Powell*,

---

[1] While *Mapp* and *Wolf* v *Colorado*, 338 US 25 (1949), were both decided by a closely divided Court, in each case opponents of applying the exclusionary rule to the states based their positions *not* on opposition to the rule itself but on considerations of federalism. It is only recently that any member of this Court has expressed opposition to the rule itself.

428 US 465, 482-486, 491-493 (1976); *United States* v *Peltier*, 422 US 531, 536-539 (1975). Deterrence was not even discussed as a basis for the rule until *Elkins*, however, and history teaches that the rule furthers at least four other vital goals as well:

First, the exclusionary rule upholds "the imperative of judicial integrity" in litigation involving Fourth Amendment rights. This Court stressed in *Elkins*, 364 US at 223, adopting Justice Holmes' dissent from *Olmstead* v *United States*, 277 US 436, 469 (1928), that " 'no distinction can be taken between the Government as prosecutor and the Government as judge.' " With regard to wilful violations, Justice Powell agrees. *Brown* v *Illinois*, 422 US 590, 611 (1975), Powell, J., concurring in part;[2]

Second, as this Court pointed out in *Terry* v *Ohio*, 392 US 1, 12 (1968), the rule is the *sole* judicial means by which these rights may effectively be protected:

> . . . *experience has taught that it [the exclusionary rule] is the only effective deterrent to police misconduct in the criminal context*, and that without it the constitutional guarantees against unreasonable searches and seizures would be a mere "form of words." (emphasis added)

See also Traynor, *"Mapp* v *Ohio* at Large in the Fifty States," 1962 Duke L J 319, 333; *Franks* v *Delaware*, 438 US 154, 169 (1978); *Elkins*, *supra*, 364 US at 220;

Third, the exclusionary rule plays a critical role in the development of a substantive Fourth Amendment law. Mertens and Wasserstrom illustrate this point in "The Good Faith Exception to the Exclusionary Rule:

---

[2] The intent with which a violation is committed is properly of no consequence, however, for, apart from the difficulty of ascertaining intent, the Fourth Amendment protects " 'against the dangers of the overzealous as well as the despotic.' " *Gerstein* v *Pugh*, 420 US 103, 118 (1975), citing *McNabb* v *United States*, 318 US 332, 343 (1943).

Deregulating the Police and Derailing the Law," 70 Geo L J 365, 404, 405-406 (1981):

> By functioning as the primary mechanism through which the courts develop and articulate the limits of the Fourth Amendment itself, the exclusionary rule plays an indispensable role in preventing Fourth Amendment violations . . . even when a court declines to suppress evidence.

Fourth, the exclusionary rule serves as an overriding symbol of our society's commitment to the primacy of law over the raw power of government and its agents "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v *United States*, 333 US 10, 14 (1948). Indeed, to many observers, "[T]he symbolic value of the exclusionary rule is perhaps its most immeasurable aspect." Geller, "Is the Evidence in on the Exclusionary Rule?" 67 ABA J 1642, 1645 (1981).

Protection of Fourth Amendment rights is a difficult process under the best of circumstances, but, contrary to the image offered by the Solicitor General of beleaguered police trying to grapple with an asserted tangle of laws, this Court recognized as long ago as *Weeks*, *supra*, that law officers in this country too often intentionally violate the law. There is a "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions." 232 US at 392. This conclusion was reiterated in *Elkins*, *supra*, 364 US at 217-218, citing with approval from Justice Jackson's dissent in *Brinegar*, *supra*, 338 US at 181:

> *Only occasional and more flagrant abuses come to the attention of the court . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is*

> *made, about which courts do nothing, and about which we never hear.* (emphasis added)[3]

Only with a strong exclusionary rule can the privacy rights of all Americans be protected from such abuse.

It is, of course, self-evident that the Fourth Amendment does not by its express language specify how it is to be enforced. It neither states that evidence obtained in violation is to be suppressed nor that evidence obtained in a "reasonably mistaken belief" that the police conduct was legal is to be admitted. Similarly, though, no language in the Constitution says how this Court is to enforce other constitutional rights, yet to give *effective* meaning to the equal protection clause in the areas of public education and voting, for example, this Court has ruled that separate educational facilities for black and white children are inherently unequal, *Brown* v *Board of Education*, 347 US 483 (1954), and that, in drawing legislative boundaries, each state must accord equal strength to each citizen's vote. *Baker* v *Carr*, 368 US 186 (1962). The Constitution by its language also does not state that the right to assistance of counsel includes the right to *effective* assistance, but just as the Court inferred such a requirement in *Powell* v *Alabama*, 287 US 45, 71 (1932), to give that right meaning, so, too, have *Weeks*, *Mapp* and their progeny required suppression of unconstitutionally seized evidence in order to assure a viable Fourth Amendment.

If appellate decisions interpreting the Fourth Amendment are at times difficult to understand, and if individual officers cannot be deterred from actions held to be errors through subsequent changes in the law, then the answers lie in better training of law enforcement personnel, better communication between prosecutors' offices and police agencies and, to the extent possible, more consistent and understandable

---

[3] See also pp 18-19, *infra*.

judicial opinions. Moreover, principles of retroactivity may be re-examined. Cf., e.g., *United States* v *Johnson*, 457 US 537 (1982). To react to these and other circumstances by reducing the level of Fourth Amendment protections, particularly to the level of police officers' subjective understanding, however, would subvert the Amendment and the values it embodies. The "[r]ights declared in words" would ". . . be lost in reality." *Weems* v *United States*, 217 US 349, 373 (1910).

AN OFFICER'S INTENT IS IRRELEVANT; A "GOOD FAITH" OR "REASONABLE MISTAKE" TEST IS INHERENTLY SUBJECTIVE AND WOULD SEVERELY UNDERMINE FOURTH AMENDMENT RIGHTS.

— The Irrelevance Of Intent

The Fourth Amendment exists *not* to assist the police or excuse their mistakes but to protect the privacy rights of all Americans by limiting police conduct and that of magistrates. Officers' beliefs as to the legality of their actions are irrelevant. This Court has emphasized in two major Fourth Amendment decisions that

> . . . good faith on the part of the arresting officers is not enough. *Henry* v *United States*, 361 US 98, 102 (1959)

> We may assume that the arresting officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officers is not enough." . . . [citing *Henry, supra*] If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police. *Beck* v *Ohio, supra*, 379 US at 98.

This axiom was recently reaffirmed in *Delaware* v *Prouse*, 440 US 648, 654 (1979), when Justice White stressed in his opinion for the Court that "the reasonableness test usually requires, at a minimum, that *the facts upon which an intrusion is based be capable of measurement against 'an objective standard.'* " (emphasis added) See also *United States* v *Ross*, 456 US 798, 808 (1982).

Consider also *Reid* v *Georgia*, 448 US 438 (1980); *Florida* v *Royer*, __ US __ (1983).

The point was further explained in *Scott* v *United States*, 436 US 128, 138 (1978), when this Court rejected the suggestion that an arrest based objectively on probable cause but for subjectively improper reasons should be invalidated:

> . . . *the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.* (emphasis added)[4]

Justice White also spoke to the issue in his dissent from the dismissal of *certiorari* in *Massachusetts* v *Painten*, 389 US 560, 565 (1968):

> . . . sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.

---

[4] Elsewhere in *Scott*, Justice Rehnquist suggests in *dictum* that while an officer's intent is irrelevant to the determination of whether there has been a substantive violation, it may be material to the decision of whether to suppress the fruits of that violation. 436 US at 135-136. This distinction is inconsistent with the constitutional foundations of the exclusionary rule, however, and it fails properly to consider the broad values served by the Amendment and the rule. See pp 4-6, *supra*.

Lower courts, too, have recognized the irrelevance of intent. In *Bell* v *United States*, 254 F2d 82 (DC Cir 1958), for example, an officer had arrested the defendants for "investigation of housebreaking." Judge Prettyman, joined by then-Judge Burger, noted that there is no crime of "investigation" but discounted the officer's improper state of mind and focused instead on the objective facts at hand:

> The question is not what name the officer attached to his action; it is whether, in the situation in which he found himself, he had reasonable ground to believe a felony had been committed and that the men in the car had committed it. 254 F2d at 86.

See also *United States* v *Bugarin-Casas*, 484 F2d 853, 854 (9th Cir 1973) at n 1; *Chaney* v *Wainwright*, 460 F2d 1263 (5th Cir 1972).

— The Inherent Subjectivity Of A "Good Faith" Or "Reasonable Mistake" Test

A "good faith" or "reasonable mistake"[5] standard in applying the exclusionary rule would be subjective under any definition. While the Solicitor General argues that subjectivity could be avoided by requiring that an officer's personal belief be "objectively reasonable" as well, neither objectivity nor clarity can be provided by reference to a "reasonably well-trained officer's" mistaken belief as to the *law*. Allowing an officer's beliefs as to the *law* to carry weight under *any* circumstances is precisely what makes the rule subjective. Rather than eliminating subjectivity, inclusion of a "reasonableness" element in the test

---

[5] In the instant cases, the United States has abandoned the term "good faith," used in its Supplemental Brief in *Illinois* v *Gates*, __ US __ (1983), in favor of "reasonable mistake." The definition of the terms remains the same in both of the Government's briefs, however.

merely adds a second layer of it. Emphatically rejecting the concept of "good faith" or "reasonable belief", Professor LaFave recently underscored the intrinsic weakness of the proposed exception:

> . . . *it is nothing short of nonsense to talk of a reasonable belief that there is probable cause*, for the probable cause standard itself takes into account reasonable mistakes of fact.[6] If mistakes of law were also to be taken into account, then the law becomes whatever the officer thinks it is. LaFave letter, Hearings on the "Exclusionary Rule Bills," 97th Congress, 1st and 2nd Sessions, Senate Judiciary Committee, Subcommittee on Criminal Law [hereinafter Hearings] (1982) at 793-794 (emphasis added)

Even if a "reasonable mistake" standard could somehow be considered objective, unless the police were required to be fully aware of what the law is, the level of tolerated police activity would sink below that permitted by the Fourth Amendment. As a matter of social policy this would be unthinkable, for it would weaken the Amendment itself and create the irony of allowing those charged with enforcing our most basic laws to be partially ignorant of them.

Only in a case involving a subsequent retroactive change in the law could police misconduct be considered to be in "complete good faith." *Michigan* v *Tucker*, 417 US 433, 447-448 (1974). The issue in such a case is more accurately one of retroactivity principles, however.

— The Impact Of A "Reasonable Mistake" Or "Good Faith" Exception On Fourth Amendment Rights

— WARRANT CASES

In cases involving warrants, a "good faith" exception to the exclusionary rule would virtually destroy the

---

[6] See discussion, *infra*, pp 14-15.

Warrant Clause. Warrants are usually issued *ex parte* and generally after at best perfunctory scrutiny. Cf., e.g., LaFave and Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich L Rev 987, 992 (1965). They may be, and in some states often are, issued by clerks or part-time magistrates untrained in the law. Cf. *Shadwick* v *City of Tampa*, 407 US 345 (1972). Further, the Warrant Clause, by its language, is directed at protecting against unlawful or abusive *issuance* of a warrant. Cf. *Weeks*, *supra*, 232 US at 394. For these reasons, full judicial review of decisions to issue warrants is essential. If a "good faith" exception were adopted in such cases, effective review, judicial self-policing and access of litigants to the courts for protection of Fourth Amendment rights in criminal cases would all be severely curtailed.

Justice Powell's opinion for the Court in *United States* v *United States District Court*, 407 US 297, 315-316 (1972), illuminates why police good intentions have no place in determining the consequences of violations of the Warrant Clause:

> *The warrant clause* of the Fourth Amendment is not dead language. Rather, it has been "a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It *is not an inconvenience to be somehow 'weighed' against the claims of police efficiency*. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." (cite omitted; emphasis added)

If an officer's subjective "good faith" were to become the standard, the scope of review would be so narrow that only in cases of perjury or reckless submission of an

affidavit could a warrant be challenged. If an officer's "reasonable belief" that he or she had probable cause or was seeking the "essential" "detached judgment of a neutral magistrate," *Gerstein* v *Pugh*, 420 US 103, 114 (1975), were all that was required, there would be no effective way to determine that a warrant was, in fact, issued by a person "sever[ed] . . . from activities of law enforcement," *Shadwick, supra*, 407 US at 350; *Coolidge, supra*, was based on probable cause, or "particularly describ[ed] the place to be searched, and the persons or things to be seized." The Warrant Clause, the "bulwark of Fourth Amendment protection," *Franks, supra*, 438 US at 164, would become "dead language," a desiccated relic.

Further, if a primary justification for a "reasonable mistake" exception is to account for an officer's need to make split-second decisions in rapidly unfolding encounters, cf., e.g., Brief for the United States at 49; *United States* v *Williams*, 622 F2d 830, 842 (5th Cir 1980) (*en banc*), concurring opinion, this consideration argues *against* adoption of such an exception in cases where, because a warrant has been obtained, there clearly was no need for instantaneous action.

— IN GENERAL

In either a warrant case or a warrantless case, a "reasonable mistake" or "good faith" exception would also be an abdication of the judiciary's constitutional duty, for it would effectively give the police a voice in the probable cause determination. It is, however, emphatically the responsibility of the courts to determine the legality of police conduct. Justice Powell emphasized this point as well in *Gerstein* v *Pugh, supra*, 420 US at 112-113, citing from *Johnson* v *United States, supra*, 333 US at 13-14:

> "The point of the *Fourth Amendment*, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual

> inferences which reasonable men draw from evidence. Its *protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*" (emphasis added)

As Justice Jackson noted further for the Court in *Johnson*,

> Any other rule would . . . obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law. 333 US at 17.

Because of the vagaries of the human memory, attempting to reconstruct a mental state after a search or arrest has occurred would also leave courts dangerously vulnerable to, in effect, justifying searches on the basis of their results. *Johnson, supra; United States* v *DiRe, supra.*

State and federal courts are called upon to review the conduct of trial judges, magistrates and police officers in a broad range of contexts, and in *no* other situation is a "reasonable mistake of law" considered as even a factor in determining whether to affirm or reverse a decision. To single out Fourth Amendment questions for such disparate treatment would suggest hostility to its protections and be incompatible with the valued place the Amendment occupies in our society.

By condoning objectively unreasonable conduct based on asserted "good faith," such an exception would also create the anomaly of a "reasonable unreasonable search."

— Current Law Is Already Adequately Flexible

Current Fourth Amendment law is also already adequately flexible, taking into account an officer's objectively reasonable mistakes of fact and giving wide latitude to a magistrate's decision to issue a warrant. An

officer's belief that certain facts exist will, if the facts would be sufficient to create probable cause, uphold a search or seizure whether or not the facts later turn out to have existed, so long as the belief was *objectively* reasonable at the time. *Beck* v *Ohio*, *supra*; *Henry* v *United States*, *supra*; *Delaware* v *Prouse*, *supra*, 440 US at 654-655.[7] Hearsay and rumor, if properly supported, may be relied upon in order to establish probable cause, cf., e.g., *United States* v *Harris*, 403 US 573 (1971); *Draper* v *United States*, 358 US 307 (1959), and an officer receives the benefit of doubt when he or she has been required to make a quick factual judgment. *Warden* v *Hayden*, 387 US 294, 298-299 (1967). When acting on the basis of their experience, police may also attach significance to circumstances that would appear innocuous to lay persons. *United States* v *Cortez*, 449 US 411, 418 (1981).

In warrant situations, the magistrate, too, is given substantial discretion. Great deference is accorded to a magistrate's determination of probable cause, and "the resolution of doubtful or marginal cases in this area . . . [is] largely determined by the preference to be accorded to warrants." *United States* v *Ventresca*, 380 US 102, 109 (1965). In practice, a warrant is invalidated only if the magistrate's judgment was "arbitrarily exercised." Cf., e.g., *United States* v *Giacalone*, 541 F2d 508, 513 (6th Cir 1976) (*en banc*).

The foregoing observations illustrate the ultimate flaw in Petitioners' arguments: The balance between individual rights and power of government depends not on the reasonableness of an officer's belief in a given case but on the balance of rights struck in the Constitution. Cf. *Dunaway* v *New York*, 442 US 200, 213-215 (1979).

---

[7] *Hill* v *California*, 401 US 797 (1971), relied on by the United States, Brief at 55, is an example of a reasonable mistake of *fact* and provides no support to the argument for a "good faith" exception for mistakes of *law*.

United States v *Caceres*, 440 US 741 (1971), also relied on by the United States, Brief at 54-55, also provides no support to the government's position, for there was no constitutional error in that case.

THE EXCLUSIONARY RULE IN ITS PRESENT FORM HAS BEEN DEMONSTRABLY SUCCESSFUL IN DETERRING UNLAWFUL POLICE CONDUCT.

The arguments presented in favor of a "reasonable mistake" exception erroneously consider only a narrow, individualized notion of deterrence. In establishing a rule enforcing a constitutional right, however, this Court looks not only to conduct in single cases but to broad consequences as well; it expresses both its expectations as to what conduct is likely to be deterred and its views as to what conduct *ought* to be deterred.

Criminal trials are not private actions, moreover, and as Professor LaFave stressed in his Senate testimony, "exclusion is not a sanction to which the officer is personally subjected, but rather is a sanction that is imposed upon the system." Hearings at 328. Justice Stevens further explained the point in his concurring opinion in *Dunaway, supra*, 442 US at 221:

> The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole — not the aberrant individual officer — to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights. For that reason, exclusionary rules should embody objective criteria rather than subjective considerations.

In the eyes of the law, the benefit of suppression to the accused is secondary to the long-term benefit to society from protection of the cherished and delicate constitutional rights involved.

However imprecise the exclusionary rule's deterrent impact may be in individual cases,[8] it is real. Professor

---

[8] See, e.g., Mertens and Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo L J 365, 389-390 (1981) and studies cited therein.

Loewenthal concluded after "countless" interviews with and observations of New York City Police officers from 1971 to 1974 and again between 1976 and 1978 that

> there is substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained. Loewenthal, "Evaluating the Exclusionary Rule in Search and Seizure," 49 UMKC L Rev 24, 29 (1980)

Widespread systemic deterrence also exists and is readily demonstrable. Maryland Attorney General Stephen H. Sachs, previously United States Attorney for the District of Maryland, underscored the relationship between the exclusionary rule and police training during his 1982 testimony before the Senate Judiciary Committee's Subcommittee on Criminal Law:

> In my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last 20 years. Sachs, Hearings at 41

Included in post-*Mapp* training are "much longer training periods for new officers, especially courses about constitutional rights," "in-service training, [which was] virtually non-existent before," a higher calibre of training, "training geared to practical situations such as stop and frisk exercises," and "testing constitutional law knowledge on promotional exams." *Id.*, at 41-42.

Even Professor Ball, a critic of the rule, concedes that the rule has accomplished "increased police training and awareness about their responsibilities." Ball, "Good Faith and the Fourth Amendment: The 'Reasonable' Exception to the Exclusionary Rule," 69 J Crim L & Criminology 635, 656 (1978).

Observers of police practices have also noted a gradual acceptance of the exclusionary rule over time, as officers

accustomed to illegal practices have either retired or come to accept the rule and new officers, unused to the old standard, have been hired and trained to function within the law. See, e.g., Mertens and Wasserstrom, *supra*, 70 Geo L J at 394-401; Sachs, Hearings at 23, 30.

The deterrent value of the exclusionary rule and its inseparability from protection of substantive Fourth Amendment rights are also vividly illustrated by initial police reaction to *Mapp*. *Mapp* did not change substantive Fourth Amendment law one iota, yet in its wake then-New York City Police Commissioner Murphy argued that it had required total restructuring of his department's training procedures "from the very top administrators down to each of the thousands of foot patrolmen . . ." Kamisar, "Is the Exclusionary Rule an 'Illogical' or 'Unnatural' Interpretation of the Fourth Amendment," 62 Judicature 66, 72 (1978) (quoting Murphy, "Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments," 44 Tex L Rev 939, 941 (1966)).

Commissioner Murphy's reaction to *Mapp* proved again this Court's crucial observation in that case that an exclusionary rule was necessary, in part, because without it local police were simply not complying with the dictates of the Fourth Amendment. *Mapp* v *Ohio*, *supra*, 367 US at 657-658. This point was also recently conceded by the Police Executive Research Forum in its prepared statement to the Senate Subcommittee Hearings. *Id.*, at 299. It was also this same observation that had led the California Supreme Court to adopt an exclusionary rule six years prior to *Mapp* in *People* v *Cahan*, 44 Cal 2d 434, 282 P2d 905 (1955). The evolution of then-Chief Justice Traynor's feelings on the issue further illustrates the need for the rule:

> My misgivings about its admissibility [illegally obtained evidence] grew as I observed that time after time it was being offered and admitted as a

> routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent . . . Traynor, "*Mapp* v *Ohio* at Large in the Fifty States," 1962 Duke LJ 319, 321-322.

Sachs emphasized the same point when he testified that "in the heat of the chase, and in the absence of effective sanction, I believe that we would define those [Fourth Amendment] rights, to put it mildly, somewhat narrowly." Hearings at 38. Stated in other words, if the exclusionary rule were weakened, there would be a corresponding increase in police violations of the Fourth Amendment.

A "GOOD FAITH" OR "REASONABLE BELIEF" TEST WOULD ENCOURAGE POLICE IGNORANCE, BE ADMINISTRATIVELY UNFEASIBLE AND WOULD CURTAIL SUBSTANTIVE DEVELOPMENT OF FOURTH AMENDMENT LAW.

— Encouragement of Police Ignorance

A "good faith" or "reasonable mistake" exception to the exclusionary rule that condoned admission of evidence seized in violation of the Fourth Amendment would inevitably encourage police ignorance of the law, for, as stressed above, there would no longer be any incentive for police to be fully aware of the law. Over time, this circumstance would itself produce greater police illegality. Professor Kaplan, a critic of the exclusionary rule, concedes the point, admitting that such an exception

> would put a premium on the ignorance of the police officer and, more significantly, on the department which trains him. A police department dedicated to crime control values would presumably have every incentive to leave its policemen as uneducated as possible about the

law of search and seizure so that a large percentage of their constitutional violations properly could be labeled as inadvertent. Kaplan, "The Limits of the Exclusionary Rule," 26 Stan L Rev 1027, 1044 (1974).

Even Judge Wilkey, an intense opponent of the rule, finds a "good faith" exception unpalatable, agreeing that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." Wilkey, "Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule," (National Legal Center for the Public Interest, 1982) at 36.

See also Schlesinger, Hearings at 72 and 803; prepared statement and letter of the Police Executive Research Forum, Hearings at 298 and 795; American Bar Association letter, Hearings at 797-798; Sachs statement, Hearings at 43; LaFave, "The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith,' " 43 Pitt L Rev 307, 342-343 (1982); Mertens and Wasserstrom, *supra*, 70 Geo L J at 431.

That a "reasonable mistake" exception would promote official ignorance of the law is further illustrated by statements such as those by the Solicitor General and Petitioners' *amici* in these cases that "in many of the cases to which a reasonable mistake exception would apply, there is no misconduct to deter." Brief for the United States at 87; Brief of *Amici* State of Kansas, *et al*, at 3; Brief of *Amici* Seven Former Members of the Attorney General's Task Force, *et al*, at 8, 12-15, 17-19. These statements are completely unsupportable, for it is implicit in the notion of a "reasonable mistake" exception that there *was* some conduct which was *constitutionally* unreasonable and which should not have occurred. If the Government of the United States and some of the nation's highest-ranking law enforcement officials are now equating reasonableness of belief with lawfulness of conduct, then adoption of the proposed exception would most assuredly result in drastically increased police ignorance.

— Administrative Unfeasibility Of A "Good Faith," "Reasonable Mistake" Or "Technical Violation" Rule

A "reasonable mistake" exception would also create an impossible administrative situation. If this Court were to adopt a test that asked whether a reasonably well-trained officer would have made the same mistake, a suppression hearing — after determining that a Fourth Amendment violation had occurred — would then reasonably be expected to consider all of the following circumstances:

> What was the exact basis for this officer's belief that the misconduct involved here was lawful? How long has the officer been working in law enforcement? How many times has he or she faced a similar situation? Has he or she made this error before and, if so, how many times?
>
> At the time the officer received his or her initial training, how much instruction was provided on Fourth Amendment issues in general and on this issue in particular? How much training was provided as to other constitutional rights? How much Fourth Amendment training was provided to officers in other nearby departments? How much additional training on Fourth Amendment issues would have been reasonably available locally? How did the officer score on test questions concerning Fourth Amendment rights?
>
> How much subsequent training has this agency offered on Fourth Amendment questions in general and on this question in particular? How much of that training has this officer received? How much subsequent training have other nearby departments offered, and how much additional training would have been reasonably available locally? How much of this training is mandatory?

What procedures does this agency have for disseminating and explaining information on significant new appellate decisions on Fourth Amendment rights? How regularly are these procedures followed and, if applicable, were they followed in this case?

What provision has this agency made to have legal advice available to on-duty officers? Did the officer obtain or seek that advice in this case? How many times in the past has he or she sought legal advice? How often do other officers in the department seek legal advice?

How carefully are the officer's Fourth Amendment activities supervised? How carefully were they supervised in this case? What is the policy and what is the practice of the department as to consequences to officers for committing Fourth Amendment violations? Has he or she ever been disciplined for this or a similar violation?

These questions are basic ones which would need to be answered in any case, and the answers to some would invariably raise others. Moreover, the inquiry would become geometrically more complicated where more than one officer was involved in the arrest or search or officers from more than one department were involved, each of which is a routine occurrence. Such litigation wuld have nothing to do with adjudication of Fourth Amendment rights. It would be "an unabated waste of judicial resources." Wilkey, *supra*.

Further, given the differences in training in different departments, it would also be virtually impossible to establish a single standard of reasonableness, for a federal agent or an officer in a large, urban department would almost certainly be better trained than an officer in a small or rural department or a department with a minimal budget.

— Impact On Development Of Substantive Law

This Court did not develop substantive Fourth Amendment law until after *Weeks*, and it did not seriously apply substantive Fourth Amendment law to the states until after *Mapp*. A decision creating a "reasonable mistake" exception to the exclusionary rule would avoid the need to reach Fourth Amendment questions in many cases and would, therefore, " 'stop dead in its tracks judicial development of . . . [these] rights.' " LaFave, *supra*, 43 Pitt L Rev at 354, quoting Brennan, J., dissenting in *United States* v *Peltier*, *supra*, 422 at 554. Even if the exception were stated to require an initial decision as to the legality of the police conduct involved, in practice busy trial courts with heavy dockets could be expected to do just the opposite. Indeed, the Solicitor General seeks just such a result. Brief for the United States at 74-76. Such a practice would also be consistent with this Court's long-standing policy of avoiding constitutional questions whenever possible. *NAACP* v *Alabama*, 357 US 449 (1958). As a result, Fourth Amendment law would atrophy.

— Impossibility Of "Technical" Or "Negligent" Violation Exception

A "reasonable mistake" or "good faith" exception to the exclusionary rule would also fail to provide an appropriate means of accounting for purportedly "technical" or "negligent" violations of the Fourth Amendment. A separate standard for assertedly minor constitutional violations would be inappropriate in any event, for as noted above, p 5, n 2, the Constitution protects against " 'the overzealous as well as the despotic,' " and it is a contradiction in terms to speak of a "technical" violation of a basic Constitutional right. Cf., LaFave, *supra*, 43 Pitt L Rev at 341.

A "technical" or "negligent" mistake exception would also be unenforceable. An analogous rule was rejected by this Court in *Irvine* v *California*, 347 US 128 (1954), where

Justice Jackson, in his plurality opinion, "decline[d] to introduce vague and subjective distinctions" into rules for the administration of constitutional rights, 347 US at 134, and Justice Clark, concurring, stressed:

> Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell — other than by guesswork — just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. 347 US at 138.

Pitler has similarly refuted the argument that only "non-technical" violations of *Miranda* v *Arizona*, 384 US 436 (1966), should require exclusion:

> [Such a rule] involves a great deal of subjectivity on the part of judges, making it extremely difficult to draw any real lines of distinction. Unable to foresee what activity will result in the exclusion of evidence, law enforcement officials may find it difficult to establish workable rules of procedure and convenient not to take the proscription seriously. Pitler, " 'The Fruit of the Poisonous Tree' Revisited and Shepardized," 56 Cal L Rev 579, 583 (1968)

THE EXCLUSIONARY RULE HAS MINIMAL EVIDENTIARY COSTS.

— Introduction

A "good faith" or "reasonable mistake" exception is not warranted by the evidentiary costs of the rule. Contrary to the often-voiced claim that the rule results in large numbers of guilty persons going free, the empirical

record belies this claim. As this Court emphasized in *Elkins*, *supra*, 364 US at 217, the rule is remedial, not punitive, and, contrary to Judge Wilkey's assertion, it is not "the inevitable and certain result" of application of the rule "that the guilty criminal defendant goes free." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 215, 223 (1978). Application of the rule results only in the loss of that evidence obtained by or directly derived from the violation. Only in possessory offense cases is an end to the prosecution likely.[9]

It is also not true that "the exclusionary rule benefits only those who are unquestionably guilty," Brief for the United States at 69, or is unique in preventing reliable evidence from being presented in court. Innocent persons who are not illegally searched because of police respect for the present consequences of an illegal search are in a very concrete way protected by the rule. Further, an accused may have been physically near contraband seized from a place in which he or she had a reasonable expectation of privacy without having been in possession of the contraband. Numerous persons find themselves in highly suspicious circumstances at one time or another without having committed any crime whatever. Cf., e.g., *United States* v *Pintado*, __ F2d __ [#82-5503] (11th Cir 1983); *United States* v *Soto*, __ F2d __

---

[9] In many cases, convictions are, in fact, obtained following reversal without the use of illegally seized evidence. In *Coolidge* v *New Hampshire*, 403 US 443 (1971); *Davis* v *Mississippi*, 394 US 721 (1967); and *Bumper* v *North Carolina*, 391 US 543 (1968), for example, defendants were all re-convicted without the use of the evidence suppressed in their individual cases. Cf. Mertens and Wasserstrom, *supra*, 70 Geo L J at 445-446. The myth equating suppression with dismissal often draws on then-Judge Cardozo's line from *People* v *DeFore*, 242 NY 13, 21, 150 NE 585, 587 (1926), "The criminal is to go free because the constable has blundered." Although often quoted, this statement is inaccurate. Cardozo's suggested best alternative to a suppression rule is also worth noting: "The officer might have been resisted . . ." *Id.* *Amicus* doubts that such an option was reasonable in 1926; in 1983, it would be virtually suicidal.

[#83-1099] (2d Cir 1983); *United States* v *Bethea*, 442 F2d 790 (DC Cir 1971); *United States* v *Bonds*, 435 F2d 164 (9th Cir 1970).

Reliable evidence is also excluded in numerous other contexts: The attorney-client privilege, the marital privilege and the provisions of FRE 403, for example, all result in reliable evidence being excluded from use in court. A statement given without an effective waiver of rights is also suppressed without regard for the reliability of the statement. Far from contributing to "erroneous verdicts," Brief for the United States at 34, however, these rules of exclusion, like their Fourth Amendment counterpart, properly reflect the high values our jurisprudence places on considerations other than mere presentation of all reliable evidence.[10]

The exclusionary rule does not in any way define what police conduct is lawful or unlawful; it merely defines the procedural remedy for some unlawful conduct. It is the Fourth Amendment which restricts the activities of the police and of the courts, and it is the Fourth Amendment which, when followed, at times deprives the government of some evidence.

An officer who complies with the Fourth Amendment in the first place obtains no less admissible evidence than an officer who has violated the rule and had evidence suppressed as a result. In fact, the prudent officer may obtain *more* admissible evidence. By obtaining a properly supported search warrant to support his or her actions in a situation where another officer acts unjustifiably without a warrant, or hastily with an inadequate warrant, for example, the officer abiding by the Constitution obtains more evidence for use in a prosecution.

[10] The basic rule requiring acquittal unless guilt is proven beyond a reasonable doubt also results at times in the freeing of persons who are, in fact, guilty. An acquittal growing, in part, out of the exclusion of illegally seized evidence is no more an erroneous verdict, however, than is an acquittal based on proof which fails to satisfy a jury beyond a reasonable doubt.

— Empirical Evidence On Costs Of The Rule

Empirical evidence on the evidentiary costs of Fourth Amendment enforcement within the federal system demonstrates an extremely minimal impact on the results of criminal prosecutions. In a 1979 study of 2,804 defendant cases in 38 United States Attorneys' offices, the General Accounting Office found that in less than half the cases involving a search or seizure was a motion to suppress even filed and that in only 1.3% of the defendant cases was evidence excluded as the result of the filing of a motion to suppress. General Accounting Office, "Impact of the Exclusionary Rule on Federal Criminal Prosecutions," (1979) at 9-11. Even where a motion was granted in whole or in part, the rate of conviction remained over 50% (as compared with an 84% conviction rate in cases where motions had been denied). *Id.*, at 13. Overall, a finding of illegal search and seizure resulted in dismissal or acquittal in only 0.7% of the cases studied. Moreover, in cases where prosecution was declined, search and seizure considerations played no part whatever in the decision not to prosecute in all but 0.4% of cases. *Id.*, at 13-14.[11]

---

[11] Citing the December, 1982, National Institute of Justice report, "The Effects of the Exclusionary Rule: A Study in California," the Government criticizes the GAO report, claiming that " '[m]ost of the federal caseload at the time of the [GAO] study was composed of such white collar crimes as embezzlement, fraud and forgery. Search and seizure issues are seldom raised in these cases.' " Brief at 70, citing NIJ study at 7. The NIJ study cites no authority for this claim, and, in fact, it is incorrect: The GAO study determined that, depending on the size of the United States Attorney's office studied, between 69% and 88% of the cases accepted for prosecution involved charges where seized evidence would be susceptible to search and seizure challenge. GAO report, Appendix II at 7.

At the Senate Subcommittee hearings the Government also questioned the reliability of the GAO's findings for their asserted failure to consider prosecutions dropped prior to formal entry into the system. Hearings at 87. However, this factor, too, was expressly accounted for in the study. GAO report, Appendix II at 13-14.

Two other studies, one of prosecutions in Washington, D.C., and other cities by the Institute for Law and Social Research [Inslaw] and the other in New York City by the Vera Institute of Justice, provide further support. Inslaw found that Fourth Amendment issues "appear to have little impact on the overall flow of criminal cases after arrest," Geller, *supra*, 67 ABA J at 1644, and the Vera Institute concluded that the exclusionary rule "does not seem to produce dismissals in cases brought into the criminal process in which the searches are probably illegal and the evidence could be suppressed." *Id.*

Most recently, the 1982 National Institute of Justice study, "The Effects of the Exclusionary Rule: A Study in California," found that only 4.8% of all felony cases rejected for prosecution in California between 1976 and 1979 – *only 0.8% of all cases referred for prosecution – were declined for search and seizure problems.*[12, 13]

---

[12] To the NIJ, this demonstrated "a major impact of the exclusionary rule on state prosecutions." NIJ study at 2. This conclusion is impossible to square with the study's own factual results however.

The Brief of *Amicus* National District Attorneys Association, Inc., [hereafter NDAA] is also misleading when it asserts that one-third of the persons arrested in Los Angeles on felony drug charges do not come to trial because of search and seizure problems: Of the 2,461 felony cases presented for prosecution in the Pomona and Central Operations offices of the Los Angeles District Attorney's office in 1981, only 121 cases, 4.9%, were rejected for search and seizure problems.

[13] The Government and *Amicus* NDAA argue, relying on the NIJ study, that the exclusionary rule tends to free the recidivist. Brief for the United States at 71, n 36; Brief of *Amicus* NDAA at 9. That an accused's prior or possible future criminal record should have any bearing whatever on his or her right to be free of an illegal search or seizure is a notion fundamentally inconsistent with the foundations of our society. Indeed, "the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v *Rabinowitz*, 339 US 56, 69 (1950), Frankfurther, J., dissenting. The Government's and NDAA's source does not even bear out their assertion, moreover: The figures relied on involve merely arrests and not convictions. NIJ study at 2.

Professor LaFave has also written that, "[T]here is reason to believe that the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed." LaFave, *Search and Seizure* § 1.2 n 9 (1981 Supp).

The American Bar Association, which "strongly supports retention of the exclusionary rule" on constitutional and practical grounds, has concluded that the "rule is not responsible for hordes of criminals going free" and that "a dispassionate examination of the facts belies the mythology surrounding the rule." 67 ABA J 1614 (1981); see also Greenhalgh, Hearings at 76 ff.

— Objective Limits On Application Of The Rule

The exclusionary rule is also already extremely limited in application, many of these limitations having been added by this Court in the past ten years.[14] In its present form, the rule is available only to individuals whose personal Fourth Amendment rights have been violated, *United States* v *Salvucci*, 448 US 83 (1980); *Rawlings* v *Kentucky*, 448 US 98 (1980); and it does not prevent the use of unconstitutionally seized evidence before a grand jury, *United States* v *Calandra*, 414 US 338 (1974), or in civil proceedings, *United States* v *Janis*, 428 US 433 (1976), or in impeaching a defendant's testimony, *United States* v *Havens*, 446 US 620 (1980).

The exclusionary rule will also not prevent a person's prosecution when he or she has been unconstitutionally seized, *Frisbie* v *Collins*, 342 US 519 (1952), nor a victim's in-court identification of an accused following an illegal arrest, *United States* v *Crews*, 445 US 463 (1980), nor the use of evidence discovered by means independent of police misconduct, *United States* v *Ceccolini*, 435 US 268

---

[14] Many of these changes have come subsequent to Justice White's dissent in *Stone* v *Powell*, 428 US 465, 536-542 (1976), in which he criticized the breadth of the rule and suggested a "good faith" exception.

(1978), or evidence whose connection with the constitutional violation is so attenuated as to dissipate the taint. *Nardone* v *United States*, 308 US 341 (1939). Evidence gained as a result of an arrest valid on Fourth Amendment grounds but for violation of an enactment later held unconstitutional on due process grounds is also admissible. *Michigan* v *DeFillippo*, 443 US 31 (1979).

These limitations are significant, for they confine the impact of the rule to (1) criminal prosecutions where the government is intending to use (2) evidence obtained as a direct consequence of (3) a Fourth Amendment violation (4) as substantive proof (5) at a stage where the rules of evidence apply (6) against an accused with a significant personal connection with the area searched or the item(s) seized.

In addition, a state prisoner who has had an opportunity for full and fair litigation of Fourth Amendment claims in state court may not obtain federal *habeas corpus* relief on the ground that evidence introduced at his or her trial was obtained as a result of an unconstitutional search or seizure. *Stone* v *Powell*, *supra*.

A "GOOD FAITH" OR "REASONABLE MISTAKE" EXCEPTION WOULD HAVE DETRIMENTAL SYMBOLIC AND HUMAN COSTS, PARTICULARLY FOR MINORITIES.

— Symbolic Costs

Creation of a "good faith" or "reasonable mistake" exception to the exclusionary rule would also have a stark symbolic significance. To this Court, the public and the police, the ultimate yardstick of legality is admissibility:

> A ruling admitting evidence at a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence. *Terry* v *Ohio*, *supra*, 394 US at 13.

A decision creating a "good faith" exception would lead police to feel that "the fourth amendment is not a serious matter, if indeed it applies to them at all." Loewenthal, *supra*, 49 UMKC L Rev at 30. Professor Ball, too, concedes that "[a] signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police." *Id.*, 69 J Crim L & Criminology at 656. See also LaFave, *supra*, 43 Pitt L Rev at 358.

> Moreover, police doubts are likely to be stronger now than they would be if the exclusionary rule had never been imposed. *Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute remedies may be applied.*[15] Loewenthal, *supra*, 49 UMKC L Rev at 30 (emphasis added)

See also Canon, "Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention," 23 S Tex L J 559 (1982).

— Impact Of The Rule On Protecting The Rights Of Minorities

History also teaches that where police illegality occurs, the victims of that illegality are disproportionately members of racial minorities. "[O]ur unexpiated heritage of racism," McGowan, "Rule-Making and the Police," 70

---

[15] In fact, there are no viable alternatives to exclusion. The Solicitor General concedes doubt as to this point, Brief at 86-88, and this Court, too, has suggested doubts as to the viability of alternatives other than exclusion. *Franks* v *Delaware*, 438 US 154, 169 (1978).

Additionally, to the extent that civil remedies might be viable in some cases, where the error was a judicial officer's, the potential defendant is immune from suit. *Stump* v *Sparkman*, 435 US 349 (1978).

Further, because of lack of access to legal services and lack of capacity to prove damages, poor persons are the least likely victims of police misconduct to be in a position to bring successful civil actions.

Mich L Rev 659, 669 (1972), has long been reflected in police lawlessness against minorities. Cf., e.g., *Report of the National Advisory Commission on Civil Disorders* (1968) at 301 and 304. This Court, too, has noted the problem of chronic police-community tension in black and other minority communities. *Terry, supra*, 392 US at 14, n 11. See also, generally, United States Commission on Civil Rights, *Who is Guarding the Guardians?* (1981) at 6.

The dramatic increase in police training and awareness generated by the exclusionary rule has produced, in turn, an increased respect by police for individuals' constitutional rights, an incomplete process of particular value to minorities. This process would be reversed if the proposed exception were created: A "good faith" exception to the exclusionary rule would not just lead to increased police illegality, it would almost certainly produce a disproportionate increase in official illegality against racial minorities.

— The Importance Of Stability In The Law

In the twenty-two years since *Mapp*, the exclusionary rule has become an accepted fact of life to the officer on the beat, the police administrator responsible for departmental training and the average citizen going about his or her daily life. It has increasingly become a part of the basic fabric of our criminal procedure, an aspect of due process " 'rooted in the traditions and conscience,' " *Rochin* v *California*, 342 US 165, 169 (1952), of a full generation of Americans.[16]

Moreover, due process has always been considered by this Court to be a forward-looking concept reflecting a "progressive and self-confident society." *McNabb* v *United States*, 318 US 332, 344 (1943). Retreat from prior constitutionally-based holdings has been strongly disfavored.

[16] Cf., e.g., *Chicago Tribune* lead editorial, "Defend the Exclusionary Rule," January 16, 1983, sec 2, p 6; *New York Times* editorial, "Let Facts, Not Faith, Guide the Police," January 21, 1983, p 24.

Just as *Miranda* v *Arizona*, *supra*, was widely and intensively criticized for many years but was ultimately reconfirmed in *Edwards* v *Arizona*, 451 US 477 (1981), so, too, ought this Court reject any modification of the exclusionary rule. Adherence to prior decisions is a paramount principle in the law, and only in cases of the clearest error will this Court set aside its own prior judgment:

> It is almost as important that the law should be settled permanently, as that it should be settled correctly. Its rules should be fixed deliberately and adhered to firmly, unless clearly erroneous. Vacillation is a serious evil. *Gilman* v *Philadelphia*, 3 Wall 713, 724 (1866).

This principle is particularly important where a rule sought to be overruled or significantly modified is a relatively recent one, cf., e.g., *Goodtitle ex dem. Pollard* v *Kibbe*, 9 How 471, 478 (1850), especially where the composition of the Court has changed substantially in the interim.[17]

CONCLUSION

By its holdings, the language used to express them and the symbolic meaning attached to them by those most directly affected as well as by the public in general, this Court shapes not just the Constitution but many aspects of our society for the generations that will follow us. As technology progresses, Fourth Amendment rights become increasingly fragile against "a vast array of

---

[17] Cf., *Malinski* v *New York*, 324 US 401, 417 (1945), Frankfurter, J., concurring: "The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment."

electronic surveillance," *United States* v *Bailey*, 628 F2d 938, 947-949 (6th Cir 1980), Keith, J., concurring,[18] and it becomes increasingly important that this Court recall the history and values of the Amendment to assure its protection in the face of new, more insidious dangers.

Justices Brandeis and Stewart, in two noted opinions, have prophetically explained why the exclusionary rule promotes rather than hinders respect for the law. Their words vividly illustrate why this Court must reject the proposed exception:

> In a government of laws, existence of the government will be imperilled if it fails to observe that law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v *United States, supra*, 277 US at 485, dissenting opinion, cited with approval in *Elkins* v *United States, supra*, 364 US at 223.

---

[18] See also Dash, Knowlton and Schwartz, *The Eavesdroppers* 339-379 (1959); Westin, *Privacy and Freedom* 69-89 (1967); Sachs, Hearings at 27-28.

> In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the Fourth Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won — by legal and constitutional means in England, and by revolution on this continent — a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. *Coolidge* v *New Hampshire*, *supra*, 403 US at 455.

For all of these reasons, a "reasonable belief" or "good faith" exception to the exclusionary rule should be rejected, and the exclusionary rule should be reaffirmed in its present form.

Respectfully submitted,

NATIONAL LEGAL AID
AND DEFENDER ASSOCIATION
1625 K Street, NW
Washington, D.C. 20006

By: MOGILL, POSNER, COHEN & WEISS
By: KENNETH M. MOGILL
1455 Centre Street
Detroit, Michigan 48226
(313) 962-7210

Dated: November 11, 1983

Nos. 82-1771, 82-963, and 82-1711

NOV 28 1983

ALEXANDER L. STEVAS
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,
v.
ALBERTO ANTONIO LEON, et al.,
Respondents.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,
v.
OSBORNE SHEPPARD,
Respondent.

STATE OF COLORADO,
Petitioner,
v.
FIDEL QUINTERO,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit,
The Supreme Judicial Court of Massachusetts, and
The Supreme Court of Colorado

BRIEF FOR AMICI CURIAE BAR ASSOCIATION OF SAN FRANCISCO AND BAR ASSOCIATION OF BEVERLY HILLS

JAMES J. BRENNAHAN
COUNSEL OF RECORD
PAUL FLUM
MORRISON & FOERSTER
One Market Plaza
Spear Street Tower
San Francisco, California 94105
(415) 777-6000

Attorneys for Amici Curiae
Bar Association of San Francisco
and Bar Association of
Beverly Hills

QUESTION PRESENTED

Can evidence obtained by law enforcement officers in violation of the fourth and fourteenth amendments be admitted into evidence upon a finding that it was obtained in "good faith."

TABLE OF CONTENTS

	Page
Interest of the Bar Association of San Francisco and the Bar Association of Beverly Hills	1
Summary of argument	2
Argument	3
I. A "good faith" exception will undermine deterrence and burden the courts	3
A. Deterrence	3
B. Burden on the courts	9
II. The government's suggested reasons for a "good faith" exception are without merit	10
III. Deterrence has applied and should apply to magistrates as well as officers	13
IV. A "good faith" exception is unnecessary because new fourth amendment decisions are prospective only or of sharply limited retroactivity	16
V. The exclusionary rule is constitutionally mandated and not "merely" a rule of evidence	18
Conclusion	19

TABLE OF AUTHORITIES

Cases

	Page
Aguilar v. Texas, 378 U.S. 108 (1964)	12
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)	6
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)	16
Boddie v. Connecticut, 401 U.S. 371 (1971)	19
Boyd v. United States, 116 U.S. 616 (1885)	18
Brewer v. Williams, 430 U.S. 387 (1977)	8
Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500 (1958)	5
Douglas v. California, 372 U.S. 353 (1963)	18, 19
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)	8
Griffin v. Illinois, 351 U.S. 12 (1956)	19
Griswold v. Connecticut, 381 U.S. 479 (1965)	19
Harper v. Virginia Board of Elections, 383 U.S. 663 (1966)	18
Illinois v. Gates, ... U.S. ....., 103 S. Ct. 2317 (1983)	4, 7, 14
Ker v. California, 374 U.S. 23 (1963)	18
Lo-Ji Sales, Inc. v. State of New York, 442 U.S. 319 (1979)	13, 14
Mapp v. Ohio, 367 U.S. 643 (1961)	1, 2, 3, 18

Table of Authorities

Cases

	Page
Michigan v. DeFillippo, 443 U.S. 31 (1979)	3, 16
People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955)	1
People v. Potwora, 48 N.Y.2d 91, 397 N.E.2d 361 (1979)	14
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	19
Pierson v. Ray, 386 U.S. 547 (1967)	15
Roe v. Wade, 410 U.S. 113 (1973)	19
Shapiro v. Thompson, 394 U.S. 618 (1969)	19
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)	18
Skinner v. Oklahoma, 316 U.S. 535 (1942)	19
Spinelli v. United States, 393 U.S. 410 (1969)	12
Stone v. Powell, 428 U.S. 465 (1976)	10
Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975)	15, 16
United States v. Calandra, 414 U.S. 338 (1974)	2
United States v. Gitcho, 601 F.2d 369 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979)	16
United States v. Johnson, 457 U.S. 537 (1982)	3, 16, 17
United States v. Peltier, 422 U.S. 531 (1975)	16
United States v. Williams, 622 F.2d 830 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981)	5
Weeks v. United States, 232 U.S. 383 (1914)	18

TABLE OF AUTHORITIES

Constitution

Page

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV ..... *passim*

Other Authorities

Benenson, Court Backlog, Congressional Quarterly Editorial Research Report, Vol. II, No. 13 (1983).... 9

B. Cardozo, The Nature of the Judicial Process (1960) 19

Comp. Gen. Rep. No. GGD-79-45, Impact of the Exclusionary Rule on Federal Criminal Prosecutions (1979) 10

E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (1977) 5

J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980) 4, 19

1 W. LaFave, Search and Seizure: A Treatise on The Fourth Amendment (1983 Supp.) 8

The Recorder, Nov. 3, 1983 15

L. Tiffany, D. McIntyre, Jr., & D. Rotenberg, Detection of Crime (1967) 8

Nos. 82-1771, 82-963, and 82-1711

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERTO ANTONIO LEON, et al.,
Respondents.

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

OSBORNE SHEPPARD,
Respondent.

STATE OF COLORADO,
Petitioner,

v.

FIDEL QUINTERO,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit, The Supreme Judicial Court of Massachusetts, and The Supreme Court of Colorado

BRIEF FOR AMICI CURIAE BAR ASSOCIATION OF SAN FRANCISCO AND BAR ASSOCIATION OF BEVERLY HILLS

INTEREST OF THE BAR ASSOCIATION OF SAN FRANCISCO AND THE BAR ASSOCIATION OF BEVERLY HILLS

The 7,600 members of the Bar Association of San Francisco and the Bar Association of Beverly Hills include many experienced criminal practitioners on both sides of the bar and many who practice in the urban criminal courts and the smaller courts in suburban and rural counties throughout California.[1]

Amici have been vigorously interested in sound police procedures and balancing the need for efficient and effective law enforcement with the rights of citizens. Amici file this brief because of concern that any "good faith" exception will let down the barriers to unconstitutional law enforcement, send a signal that courts should be less vigilant in protecting constitutional rights, and return day-to-day law enforcement to a system including too frequent fourth amendment violations, such as occurred prior to *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) (exclusion required in California state courts) and *Mapp v. Ohio*, 367 U.S. 643 (1961). The Associations' members have a long history of observing and participating in programs aimed at regulating police procedures and, for the reasons stated in this brief, have concern about a return to legal rules that tacitly condone fourth and fourteenth amendment violations. If this Court is prepared to forgive a fourth amendment violation, there is no reason why a local police administrator should not do the same.

Of equal concern are the inevitable additional burdens that will be placed on already overburdened state and federal judges in ruling on suppression motions under the proposed two-tiered, "good faith" system.

---

[1]Pursuant to Supreme Court Rule 36.2, amici curiae Bar Association of San Francisco and Bar Association of Beverly Hills have obtained the written consent of counsel for the parties in Nos. 82-1771, 82-963, and 82-1711.

SUMMARY OF ARGUMENT

The fourth amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects" by prohibiting "unreasonable searches" and requiring that warrants be issued only "upon probable cause" and "particularly describ[e]" the place to be searched and things to be seized. U.S. Const. amend. IV. These fundamental guarantees are enforced by excluding, from trial, evidence obtained in violation of the fourth amendment in order to deter future violations. *Mapp v. Ohio*, 367 U.S. 643 (1961); *United States v. Calandra*, 414 U.S. 338 (1974).

In these three cases, the government[1] has proposed that this Court create an exception to the exclusionary rule to apply where police and magistrates violate the fourth amendment in "good faith." Under the government's proposed "reasonable mistake" exception, evidence obtained in violation of the fourth amendment would nonetheless be admissible at trial if the concededly unconstitutional acts were in "subjective good faith" and were "grounded in objective reasonableness" (Br. 78).

This two-tiered,[2] "good faith" analysis should be rejected, precisely because it is hopelessly inconsistent with the goal of deterring fourth amendment violations. The proposed "good faith" exception will be difficult for police to understand and burdensome for courts to apply, and will result in serious erosion of fourth amendment protections.

---

[1]For convenience, as used in this brief, "government" collectively refers to the United States of America, the State of Colorado, and the Commonwealth of Massachusetts, and "Br." refers to the brief filed in these cases by the Solicitor General of the United States.

[2]"Two-tiered," as used in this brief, refers to a bifurcated analysis under which a court would determine: (i) whether the fourth amendment had been violated; and (ii) whether the violation was in "good faith." In addition, the government has suggested a further bifurcation of "good faith" itself into "subjective good faith" and "objective reasonableness."

A "good faith" exception will also tacitly encourage police to flout fourth amendment requirements. Rather than furthering fourth amendment values, a "good faith" exception, if recognized, would seriously undermine the deterrent value of the exclusionary rule.

The shortcomings of the proposed "good faith" exception outweigh the government's highly speculative exposition of its merits. Contrary to the government's claims, suppression of illegally seized evidence is constitutionally mandated, *Mapp, supra,* at 655-56, and is an effective system-wide deterrent. Moreover, as these cases demonstrate, suppression is necessary to regulate the conduct of magistrates as well as police officers. Finally, the asserted need for a "good faith" exception is effectively undercut by the limited retroactivity accorded to this Court's decisions clarifying fourth amendment rights. *United States v. Johnson,* 457 U.S. 537 (1982); *Michigan v. DeFillippo,* 443 U.S. 31 (1979).

The government's invitation to recognize a "good faith" exception should accordingly be rejected as a dangerous and undesirable dilution of the fourth amendment.

ARGUMENT

I

A "GOOD FAITH" EXCEPTION WILL UNDERMINE DETERRENCE AND BURDEN THE COURTS

A. Deterrence

This Court has recognized that an exclusionary rule is necessary to breathe life into the fourth amendment, so that its protections are meaningful. This Court has therefore insisted on the exclusion of evidence obtained in violation of the fourth amendment, to deter such violations.

Accordingly, it is fair to ask how the goal of deterrence will be served by a two-tiered, "good faith" rule.[4]

First, a two-tiered system will be more complex and therefore less comprehensible to the policeman on the street. To current complexities will be added a "good faith" escape hatch—a lenient-sounding new rule that by its very name is an invitation to police officers to care less about fourth amendment violations. Deterrence is in large part a problem of information and training. Its object is to inform well-motivated officers of constitutional rights. A two-tiered system is undesirable because it injects an uncertain subjectivity into that process. Simply put, the "good faith" exception will be as difficult to explain to police officers as it was for the government to explain to this Court.

Compounding this problem, the new rule will send the lower courts on a convoluted mission to identify and define a second tier of "good faith." The twelve federal circuits would have twenty-four levels of analysis branching out to cover a myriad of lesser issues with inevitable conflicts and

---

[4]For those constitutional thinkers who hold to the theory that language in the Constitution should be given a literal meaning, *see, e.g.*, J. H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1-9 (1980), the Court's focus on deterrence as the sole justification for exclusion would seem out of place given the clear language of the fourth amendment:

> The right of the people to be secure in their persons, houses [*Sheppard* and *Leon*], papers and effects against unreasonable searches and seizures [*Quintero*] shall not be violated and no warrants shall issue, but upon probable cause [*Leon*], supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized [*Sheppard*].

As recognized by Justice White in his concurrence in *Illinois v. Gates*, the "imperative of judicial integrity" runs "along with . . . the deterrence concept, and . . . to focus upon the latter is to promote, not denigrate, the former." U.S. . . , 103 S. Ct. 2317, 2343 n.14 (1983) (White, J., concurring).

confusion. Complexity by itself is a good reason not to sanction such a rule.

Second, deterrence will be undercut by the inherently unwieldy nature of the proposed "good faith" test, which necessarily looks to the officer's state of mind.[8] State of mind is a torturous standard to satisfy. A typical jury instruction on proof of intent reads in part:

> Intent ordinarily may not be [illegible]tly because there is no way of [illegible] or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 81.03 (1977).

---

[8]Although the government characterizes the "good faith" standard as "objective reasonableness" (Br. 80), it relies heavily on *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), as an example of the "type of focused exception responsive to . . . the exclusionary rule" that is here advocated (Br. 45). Contrary to the government's claims, *Williams* rests upon a "good faith" formulation that contains a subjective, as well as an objective, component. As there discussed, a showing of "good faith" involves both the officer's *belief* that his conduct is constitutional and a *reasonable* basis for that belief. 622 F.2d at 840. Indeed, the Fifth Circuit's professed rationale for the "good faith" exception—the absence of deterrence value—rests upon the argument that "the officer whose future actions are to be affected *will not realize his actions are wrongful*," *id.* at 842 (emphasis added).

Moreover, the second prong of the *Williams* "good faith" test—what the government characterizes as the reasonably well-trained officer test (Br. 79)—is close to a negligence concept, with all the difficult decision-making that negligence has spawned. *See Butigan v. Yellow Cab Co.*, 49 Cal.2d 652, 660, 320 P.2d 500 (1958) ("The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand.").

By focusing on the officer's state of mind, a "good faith" standard will require the trial courts to resolve difficult subjective disputes. What did the officers think in *Quintero*? Did the officers understand the inadequacy of the warrant because of staleness and unreliability in *Leon*? Did the officers realize that the things to be seized were not listed in *Sheppard* as required by the explicit language of the fourth amendment? Although the government characterizes the "good faith" standard as "objective reasonableness" (Br. 80), in fact the focus is on the officer's state of mind, which will necessitate a subjective inquiry in every case. *Cf. Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (proof of intent to discriminate "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available").[6]

---

[6]In fact, findings of "good faith" have not been made in these three cases. There was no finding in *Quintero* that the arresting officer acted in "good faith," and the Colorado Supreme Court held that while the arresting officer may have believed the arrest was proper, "[s]uspicion does not amount to probable cause" (Br. 17). Similarly, in *Sheppard*, although the government contends that the officer "thought the warrant was valid" (Br. 12), there was no finding as to whether his failure to review the warrant, which was clearly defective on its face, prior to conducting the search amounted to "good faith." Indeed, two Justices of the Massachusetts Supreme Judicial Court held that "the search warrant was so defective that neither the police nor the issuing judge could be said to have acted in reasonable good faith" (Br. 15). Finally, although the trial court in *Leon* loosely referred to the officer's "good faith" (Br. 8), the government fails to identify any inquiry by the trial court as to whether the officer was aware that the warrant application did not establish probable cause for the search. The trial court specifically noted that there was "no question" that the reliability and credibility of the informant had not been established (Br. 7), something the officer must surely have known. On the face of it, no one could think that five-month-old information is reliable in a narcotics case.

Such an inquiry into "good faith" can also be expected to embrace a host of considerations well beyond the officer's state of mind at the time the arrest was made or the search was executed. For example, in how many other suppression hearings has the officer been involved? What conduct and constitutional issues were the subject of those prior hearings? What kinds of compliance programs were available to the officer? Did he or she attend them regularly? How well did the officer do at the programs?

Third, the "good faith" exception will send a message to police officers that is hopelessly inconsistent with deterrence. "Good faith" sounds like a loosening of the system —a tolerance and acquiescence, a judicial shrug to fourth amendment violations. Such a signal would weaken constitutional protections. For example, viewed by a policeman or a police administrator, admission of evidence in the three cases before the Court is likely to be interpreted as the judicial sanctioning of: (i) the use of stale and unreliable information in warrant applications *(Leon);* (ii) arrests without probable cause to believe a crime has been committed *(Quintero);* and, (iii) the use of warrants that do not describe the things to be seized *(Sheppard).* Moreover, the "good faith" test is at best superfluous since, as this Court has repeatedly noted, the probable cause requirement of the fourth amendment already focuses on the reasonableness of the officer's or the magistrate's actions. *See, e.g., Illinois v. Gates,* ..... U.S. ....., 103 S. Ct. 2317, 2328 (1983). If "good faith" means something other than reasonableness, the only purpose of a "good faith" test is to ratify conduct that by definition is unreasonable.

Similarly, opening the door to a "good faith" standard is an invitation to courts to fashion many innovative, lenient, "good faith" rulings. If the "good faith" exception is to be narrowly applied, as the government hints at, it will be of little value. If it will support many lenient rulings, deterrence will be seriously undermined.

Fourth, the two-tiered, "good faith" standard will lessen deterrence, since the trial court will, in effect, be required to find "bad faith" to suppress. The stigma attached to an officer by such a finding will not be imposed by many judges or in many cases. This major inhibiting effect will impinge not on "technical, trivial or inadvertent violations" only, *Brewer v. Williams*, 430 U.S. 387, 413-14 n.2 (1977) (Powell, J., concurring), but will further impair the courts' ability to safeguard fourth amendment values.

Fifth, a rule that validates any warrant, no matter how defective, by "good faith" reliance will promote magistrate shopping, thereby short-circuiting deterrence. *See* 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.2 at 9 (Supp. 1983); L. Tiffany, D. McIntyre, Jr. & D. Rotenberg, Detection of Crime 120 (1967). The latter authors, based on field studies, *ibid.* at xii, found that police officers in multi-judge courts actively shop for "lenient" magistrates:

> In one city, for example, a magistrate was contacted at his home for a search warrant despite the fact that other magistrates empowered to issue a warrant were available at the courthouse. This practice sometimes backfires when police go before a different judge for trial and he grants a motion to suppress the evidence because he believes the original search warrant should not have been issued.

Id. at 120. For deterrence to be effective, it must be aimed at officers who seek ways around the rules[1] as well as the great majority who try to conform to the Constitution.

---

[1]Such outright manipulation is not tolerated elsewhere in the judicial system. For example, case assignments in multi-judge courts are typically made on a rotation basis, rather than at a litigant's whim. Similarly, this Court has developed an elaborate body of law under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to discourage forum shopping by plaintiffs.

B. Burden on the Courts

A two-tiered, "good faith" test will place unacceptable burdens and constraints on trial and appellate courts.

At the trial court level, it should be apparent that the "good faith" test will exponentially expand the scope of suppression hearings, increasing the burdens on already overburdened trial courts. Concern about overburdening courts, which seemed so hypothetical in the 1950's and 1960's, no doubt is of grave concern to this Court in the 1980's. Work loads in the federal courts have increased dramatically. *See generally* Benenson, *Court Backlog, Congressional Quarterly Editorial Research Report,* Vol. II, No. 13, 743-45 (1983). The proposed rule would increase trial court work loads even further. Nor can any lessening of the number of suppression motions be anticipated by the use of a "good faith" test, since such motions are brought by defense counsel in any case in which evidence might be suppressed.

The probable impact of the proposed "good faith" exception on appellate court work loads is less clear. The objective component of the "good faith" test is likely to create new burdens at the appellate level. Trial court "good faith" determinations based on the reasonableness of a police officer's or magistrate's actions will require the appellate courts to explain and harmonize a wide range of decisions. The appellate courts will thus be compelled to create a new, second tier of fourth amendment jurisprudence.[8]

The subjective component of the "good faith" test, on the other hand, threatens to choke off appellate review of

---

[8]The government downplays this point, contending that the "good faith" standard will enable courts to *avoid* novel fourth amendment issues of a fact-specific nature (Br. 82-86). But that result is even worse than adding to appellate court work loads, since it would lead to the atrophication of the fourth amendment.

fourth amendment decisions. Trial court findings of fact regarding subjective "good faith" will insulate suppression decisions from appellate review, and seriously impair this Court's ability to fine-tune constitutional requirements. This Court has already placed a significant portion of the responsibility for overseeing fourth amendment violations in the hands of trial court judges. *See Stone v. Powell*, 428 U.S. 465 (1976). A "good faith" exception, if recognized, will simply expand the range of trial court decisions that are beyond appellate review.

II

THE GOVERNMENT'S SUGGESTED REASONS FOR A "GOOD FAITH" EXCEPTION ARE WITHOUT MERIT

The government has suggested seven reasons for a "good faith" rule (Br. 22-24). Each is faulty.

First, the government suggests that relevant and trustworthy evidence is excluded (Br. 22). The fourth amendment itself assumes limitations on the ability to gather evidence, and this is for the best of all reasons. In a constitutional democracy, the government is limited in what it can do to secure evidence. When this central principle is forgotten or brushed over, it is logically attractive to imagine a rule that would allow arrests of citizens when there is no probable cause to believe that a crime has been committed. But the harm done to personal freedom by such a rule would be extreme. While the number of cases where crucial evidence is currently excluded is relatively small, *see* COMP. GEN. REP. No. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 11 (1979) (evidence excluded in only 1.3% of cases studied), the number of improper arrests allowed by a "good faith" rule is potentially enormous.

Second, the government suggests that the present rule only benefits the criminal, at least in cases like these three (Br. 22-23). But system-wide deterrence will result from the application of the exclusionary rule to these three cases. In *Sheppard*, magistrates and officers would understand that warrants must specify the things to be seized. In *Leon*, magistrates and officers would understand that stale and unreliable evidence will not supply probable cause. And in *Quintero*, officers would understand that arrests cannot be made where there is no probable cause to believe that a crime has been committed.

Moreover, the government's argument on deterrence is unsupported and inconsistent—unsupported when it says there are no "meaningful comparative statistics showing the effect the exclusionary rule has had upon police conduct" (Br. 40), and inconsistent when it says that the rule would be as likely to deter lawful conduct (Br. 23-24). Does the government mean to suggest that a police administrator explaining the *Quintero* case to a class of officers would have no effect on them and their procedures? The government's argument is nothing more than an invitation to this Court to adopt a posture of false modesty. It is precisely because most officers *will* follow the courts and constitutional mandates that deterrence is a modern reality, witnessed and recognized by most and doubted only by an occasional brief writer.

Third, the government suggests a diminished public respect (Br. 23). Unsupported, this idea urges the conception of a citizenry interested only in total law enforcement. One can as easily say that respect for the police is diminished by the use of insufficient warrants or arrests unsupported by probable cause. Implicit in this point is the question of what the values of our citizens should be. It would be unacceptable to most to make decisions in criminal cases based on the wishes of an actual crowd. It would be worse

to make such decisions based on the suspected but unproven wishes of a whole population.

Fourth, the government suggests a lack of "proportionality" in suppression (Br. 23). There is an almost too synergistic understanding between the government's brief and the conduct of law enforcement officials. The government's brief is permeated with forgiveness. But how appropriate is that given the cases. In *Quintero*, the police acted without any semblance of probable cause, arresting the defendant for no other reason than that he was waiting for a bus holding a television set, and a neighbor thought he looked "nervous." In *Sheppard*, the police executed a search pursuant to a jerry-rigged warrant without even bothering to confirm whether it was properly filled out. And in *Leon*, the police submitted a warrant application that was hopelessly inadequate under both prongs of the *Aguilar-Spinelli* test.[9] Such police conduct implicates the very core of fourth amendment values; it is not a "trivial" or "technical" transgression that can be chalked up to a "good faith" misunderstanding.

Fifth, the government's suggestion that the present rule deters *lawful* conduct (Br. 23-24) is unsupported and unlikely. And sixth, the government's suggestion that the "good faith" exception will help ease court work loads (Br. 24) is equally unsupported and unlikely for the reasons given above. *See* discussion at page 9, *supra*.

Finally, the government suggests that judges do not follow the law because of the "extreme consequences" of finding a violation of the fourth amendment (Br. 24). Not only is this assertion unsupported, but it is of dubious validity. The government argues that the "good faith" exception should be adopted because it would free courts from the need to decide hard cases (Br. 83). It is only by

---

[9]*Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

deciding difficult fourth amendment cases, however, that the courts assure that its protections receive more than lip service.

III

DETERRENCE HAS APPLIED AND SHOULD APPLY TO MAGISTRATES AS WELL AS OFFICERS

In two of the cases, *Leon* and *Sheppard,* the government's argument comes down to this: the focus should be on only the officers who obtained the warrant and who therefore behaved in "good faith" because they had complied with the fourth amendment (Br. 57). The government thus attempts to exclude magistrates from the fourth amendment's coverage.

Nothing in the language of the fourth amendment, however, even remotely suggests that deterrence of magistrates is not required or desirable. The focus of the fourth amendment is on "the right of the people to be secure. . . ." On one level, it can be said that it does not matter to "the people" that an officer entering their home in violation of the fourth amendment does so in "good faith" reliance on an invalid warrant. The right is equally diminished, regardless of whether it is the officer or the magistrate who failed to comply with the fourth amendment.

Contrary to the government's tacit exemption of magistrates, this Court has held that magistrates are subject to the fourth amendment's coverage. *See Lo-Ji Sales, Inc. v. State of New York,* 442 U.S. 319 (1979). In that case, a magistrate issued a search warrant for pornographic materials which were neither specifically listed nor described in the warrant. Instead of describing the items, the magistrate accompanied the police to the defendant's store, where the magistrate reviewed various merchandise over a six-hour period, ultimately ordering the seizure of 397 magazines and 431 reels of film. An inventory of the seized items was then prepared by the police and attached to the search warrant.

This Court unanimously held that contrary to the trial court and appellate decisions below, the seized evidence should have been suppressed, because the magistrate's warrant failed to "'particularly describ[e] . . . the . . . things to be seized'" as required by the fourth amendment. 442 U.S. at 325. In response to the state's claim that the magistrate's participation somehow validated the search, the Court noted that the magistrate did not act with the requisite "neutrality and detachment demanded of a judicial officer when presented with a warrant application. . . ." *Id.* at 326 (citation omitted). *Lo-Ji* is thus bottomed on the magistrate's failure to comply with the fourth amendment.[10] *See also Illinois v. Gates,* ..... U.S. ....., 103 S. Ct. 2317, 2345 (1983) (White, J., concurring) (exclusionary rule applies where "it is plainly evident that a magistrate . . . had no business issuing a warrant"); *People v. Potwora,* 48 N.Y.2d 91, 397 N.E.2d 361, 364 (1979) (evidence suppressed "where the magistrate merely acts as a rubber stamp" because "the person who possesses the authority [must] be answerable for its exercise").

Since deterrence is the rationale for suppression, it is well applied to magistrates, who will follow the case law and who do not wish to be responsible for the exclusion of evidence. *Sheppard* is a case in point. The government

---

[10]Moreover, the Court squarely rejected any suggestion that the magistrate's "good faith" somehow rehabilitated the search:

> We need not question the subjective belief of the [magistrate] in the propriety of his actions, but the objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset.

Id. at 326-27. Although in *Gates,* Justice White suggested without citation that "the exclusionary rule was adopted to deter unlawful searches by police, not to punish the errors of magistrates and judges," 103 S. Ct. at 2345, that proposition seems inconsistent with *Lo-Ji, supra,* where evidence was suppressed precisely because the *magistrate* blundered.

attempts to create a mood of understanding (Br. 67-68), to allow this Court to acquiesce in a defective warrant. But how understandable or forgivable are the actions of the magistrate? How desirable or tolerable is it to have a magistrate discharge important responsibilities concerning the issuance of warrants by the use of forms? If the founding fathers thought that "particularly describing the . . . things to be seized" was important enough to be spelled out in the Constitution, the courts should not diminish that requirement by allowing the use of evidence seized by use of a warrant which on its face does not comply. Where is the "good faith" of the magistrate, or the officers for that matter, in issuing or using a defective warrant, when the best that can be said is that they did not read it or did not notice that it was not in compliance with the clear, unambiguous, 200-year-old language of the fourth amendment.[11]

Sheppard gives the Court a good, if disturbing, view of the potential harm to be done by a rule that would immunize magistrates' acts from this Court's review. The government's argument is seen here for what it is—not an argument that deterrence of the magistrate would not be effective, for it surely would be, but an argument that deterrence is not important.[12]

---

[11]Contrary to the suggestion of the government, there is nothing unusual about a Sunday warrant. All urban courts regularly are asked to issue warrants on Sunday and most make the arrangements to do so. For example, as reported in the official newspaper for the Superior Court for the City and County of San Francisco, a judge is designated each week to issue warrants "during the weekend and non-court hours." *See, e.g.*, The Recorder, Nov. 3, 1983, at 3, col. 2 (designation for week of Oct. 31, 1983).

[12]It is particularly important to require suppression when magistrates exceed the limits of the fourth amendment since magistrates discharging their official duties are immune from civil liability, *see Pierson v. Ray*, 386 U.S. 547, 553-55 (1967); *Timmerman v. Brown*,

IV

A "GOOD FAITH" EXCEPTION IS UNNECESSARY BECAUSE NEW FOURTH AMENDMENT DECISIONS ARE PROSPECTIVE ONLY OR OF SHARPLY LIMITED RETROACTIVITY

The government argues that evidence obtained in a "good faith" violation of the fourth amendment should not be excluded because the police are often unable to determine the scope of permissible activity (Br. 49-53). This Court's practice of retroactively applying new fourth amendment decisions on a limited and carefully circumscribed basis militates strongly against the necessity of a "good faith" exception.

In *United States v. Johnson*, 457 U.S. 537, 549 (1982), the Court confirmed that new fourth amendment decisions representing "a clear break with the past" are not applied retroactively. *See also Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979) (evidence admissible because arresting officer "should not [be] required to anticipate that a court would later hold the ordinance unconstitutional"); *United States v. Peltier*, 422 U.S. 531, 547 n.5 (1975) (Brennan, J., dissenting) (collecting cases).

---

528 F.2d 811, 812-15 (4th Cir. 1975), rendering suppression the only available deterrent. *Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

By emphasizing deterrence of magistrates, we do not suggest that suppression is necessarily required in every case where a warrant fails to comply with the fourth amendment. Suppression would be inappropriate in a case in which a warrant is based on a statute that is later held to be unconstitutional. *See Michigan v. DeFillippo*, 443 U.S. 31 (1979). Similarly, a mere typographical error in the address of the premises to be searched does not require exclusion. *See United States v. Gitchc*, 601 F.2d 369 (8th Cir.), *cert. denied*, 444 U.S. 871 (1979).

In *Johnson*, the Court separately addressed the rule of retroactivity in a second class of cases—those not representing a "clear break." The Court held that in such cases a limited rule of retroactivity, applying only to convictions not yet final at the time a new decision is rendered, is required *in order to deter fourth amendment violations by the police.* 457 U.S. at 561-62. Writing for the Court, Justice Blackmun explained that limited retroactivity was necessary because police must have an

> incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

Id. at 561 (footnote and citation omitted; emphasis in original).

Thus, the government's proposed "good faith" exception is unnecessary and inappropriate.[13]

---

[13]Moreover, the "good faith" exception, coupled with the rule of limited retroactivity, could lead to inconsistent results in some cases. For example, a defendant who mounted a successful challenge to an unconstitutional arrest or search might be denied the benefit of the new rule, because the officers were found to have acted in "good faith." However, the convictions of other defendants, which were not yet final, might be reversed under a retroactive application of the new rule. Such an anomalous result is unfair and undesirable.

V

THE EXCLUSIONARY RULE IS CONSTITUTIONALLY MANDATED AND NOT "MERELY" A RULE OF EVIDENCE

For three related reasons, this Court has repeatedly recognized that suppression of illegally seized evidence is an integral part of the rights secured by the fourth amendment. First, the language of the fourth amendment suggests that the important rights it protects would be undercut by the subsequent use of illegally seized evidence. *Weeks v. United States*, 232 U.S. 383, 393 (1914).

Second, in *Mapp v. Ohio*, 367 U.S. 643, 655-56 (1961), this Court explicitly recognized that the suppression of evidence obtained in violation of the fourth amendment is constitutionally mandated. The Court emphasized that the exclusionary rule was "an essential ingredient" of the privacy rights secured by the fourth and fourteenth amendments. As the Court noted, "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[14] *Id. See also Ker v. California*, 374 U.S. 23, 30-31 (1963); *Weeks, supra*, at 393, 398; *Boyd v. United States*, 116 U.S. 616, 630 (1885); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

Finally, the failure of the founding fathers to spell out the rule of exclusion is not controlling. This Court has consistently enforced many other important rights that are not explicitly set forth in the Constitution. *See, e.g., Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (right to vote in state elections); *Douglas v. California*, 372 U.S.

---

[14]We respectfully disagree with the government's characterization (Br. 31) of the holding in *Mapp* as the "plurality opinion." It is clear that *five* Justices held that suppression is constitutionally mandated in state court trials. *See* 367 U.S. at 655-56 (Clark, J., Brennan, J., and Warren, C.J.); *id.* at 666 (Black, J., concurring); *id.* at 666-72 (Douglas, J., concurring).

353 (1963) (right to court-appointed counsel on criminal appeal); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent's right of access to state courts in divorce action); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) right to procreation); *Roe v. Wade*, 410 U.S. 113 (1973) (woman's right to abortion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parent's right to direct upbringing of children); *Griffin v. Illinois*, 351 U.S. 12 (1956) (indigent's right to trial transcript on criminal appeal).

CONCLUSION

When all the arguments are laid in, all the cases dissected, and all the policy considerations advanced, the question remains: How are cases like these to be decided? What should a judge use to make the decision? That process, at least to an outsider, still seems a mystery. *See generally* J. H. Ely, Democracy and Distrust: A Theory of Judicial Review (1980). Even to an experienced insider the nature of the process is elusive and at times subjective. As Justice Cardozo observed, the judge

> must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.

B. Cardozo, The Nature of the Judicial Process 162 (1960).

Although the government characterizes the proposed "good faith" test as a panacea for every perceived shortcoming—real or imagined—of the exclusionary rule, it fails to address the potentially disastrous implications of the two-tiered system. A "good faith" standard focusing on the officer's subjective intent will clog the courts with lengthy

and complex suppression hearings. A "good faith" test exempting magistrates from its purview will insulate fourth amendment violations from appellate review. And a "good faith" test acquiescing in unlawful conduct will signal law enforcement officers across the country that the fourth amendment need no longer be scrupulously respected.

It is possible, even likely, that brief writers who work long enough on their arguments eventually reach hyperbole. But it seems to us that the future of the fourth amendment is at stake in these three cases. We therefore ask that the "weight" that tips Justice Cardozo's "scales" be this Court's recognition of the need to preserve and enforce the fourth amendment. We ask that not in the name of "criminals" (Br. 22-23), but in the name of all citizens whose freedom will be enhanced and protected by such a ruling. For this and all the foregoing reasons, the judgments under review should be affirmed.

November, 1983

Respectfully submitted,

James J. Brosnahan
COUNSEL OF RECORD
Paul Flum
Morrison & Foerster

Attorneys for Amici Curiae Bar Association of San Francisco and Bar Association of Beverly Hills

No. 82-963-CSY
Status: GRANTED

Title: Massachusetts, Petitioner
v.
Osborne Sheppard

Docketed:
December 8, 1982

Court: Supreme Judicial Court
of Massachusetts

Counsel for petitioner: Smith, Barbara A. H.

Counsel for respondent: Reinstein, John

Entry	Date	Note	Proceedings and Orders
1	Dec 8 1982	G	Petition for writ of certiorari filed.
2	Jan 12 1983		DISTRIBUTED. February 18, 1983
3	Jan 20 1983		Waiver of right of respondent Osborne Sheppard to respond filed.
4	Feb 1 1983	P	Response requested. (Due March 3, 1983 - NONE RECEIVED)
7	Feb 28 1983		Order extending time to file response to petition until March 10, 1983.
8	Mar 11 1983		Brief of respondent Osborne Sheppard in opposition filed.
9	Mar 16 1983	X	Reply brief of petitioner Massachusetts filed.
10	Mar 16 1983		DISTRIBUTED. April 1, 1983
11	Jun 13 1983		REDISTRIBUTED. June 16, 1983
14	Jun 22 1983		DISTRIBUTED. June 23, 1983
15	Jun 27 1983		Petition GRANTED.
			**********
17	Jul 28 1983		Order extending time to file response to petition until September 10, 1983.
18	Aug 26 1983		Leave to file consolidated brief on the merits in excess of the page limits filed with WHR (82-1771) A-144.
19	Aug 29 1983		Order granting same. Brief not to exceed 90 pages by Rehnquist, J. (A-144)
21	Sep 9 1983		Brief amicus curiae of Laws at Work, et al. filed.
22	Sep 9 1983		Brief of petitioner United States in No. 82-1711,1771 filed.
23	Sep 12 1983		Brief amicus curiae of Natl. Distr. Attys. Assn., Inc. in 82-1711,1771 filed.
24	Sep 12 1983		Brief amicus curiae of Florida, et al. filed.
25	Sep 10 1983		Brief amicus curiae of Seven Members of AG's Task Force, et al. in 82-1711,1771 filed.
26	Sep 2 1983		Order further extending time to file response to petition until September 12, 1983.
27	Sep 12 1983		Brief of petitioner Massachusetts filed.
28	Sep 12 1983		Joint appendix filed.
29	Sep 12 1983		Brief amicus curiae of Arkansas, et al. filed.
30	Sep 7 1983		Brief amicus curiae of California District Attorneys Assn. filed.
31	Sep 23 1983		Record filed.
32	Sep 23 1983		Certified original record (Box) received.
34	Sep 27 1983		Order extending time to file response to petition until November 14, 1983.
35	Sep 12 1983	D	Motion of Florida for leave to participate in oral argument as amicus curiae, for divided argument and for

No. 82-963-CSY

Entry	Date	Note	Proceedings and Orders
			additional time for oral argument filed.
36	Sep 30 1983		Opposition of petitioner Commonwealth of Massachusetts to motion of Florida for leave to participate in oral argument as filed.
37	Oct 11 1983		Motion of Florida for leave to participate in oral argument as DENIED.
38	Oct 17 1983		Leave to exceed page limits on amicus brief of National Legal Aid and Defender Assoc. filed with WJB (A-273).
39	Oct 18 1983		Order granting same not to exceed 35 pages by Brennan J.
40	Nov 3 1983		Order further extending time to file response to petition until November 28, 1983.
41	Nov 21 1983		Brief amicus curiae of National Legal Aid and Defender Association filed. VIDED.
42	Nov 23 1983		Brief amicus curiae of Bar Assn. of San Francisco, et al. filed. VIDED.
43	Nov 23 1983		Brief amicus curiae of Committee on Criminal Law, etc. filed. VIDED.
44	Dec 12 1983		SET FOR ARGUMENT. Tuesday, January 17, 1984. (2nd case)
45	Nov 28 1983		Brief of respondent Osborne Sheppard filed.
46	Nov 28 1983		Brief amicus curiae of Illinois State Bar Association filed. VIDED.
47	Nov 28 1983		Brief amicus curiae of National Assn. of Criminal Defense Lawyers, et al. filed. VIDED.
48	Dec 1 1983		CIRCULATED.
49	Nov 23 1983		Brief amicus curiae of Dan Johnston, etc. filed. VIDED.
50	Dec 12 1983	D	Motion of respondent to strike the brief of Illinois State Bar Association as amicus curiae filed.
51	Dec 14 1983		Opposition of Illinois State Bar Association as amicus curiae to motion of respondent to strike the brief of Illinois State Bar Association as filed.
52	Jan 9 1984		Motion of respondent to strike the brief of Illinois State Bar Association as DENIED.
53	Jan 7 1984		Lodging of respondent filed.
54	Jan 7 1984	X	Reply brief of petitioner Massachusetts filed.
55	Jan 17 1984		ARGUED.